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A TREATISE

ON THE

POWER OF TAXATION,

STATE AND FEDERAL,

IN THE UNITED STATES.

By FREDERICK N. JUDSON,
of the St. Louis Bar.

ST. LOUIS:
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PREFACE.

The office of a preface to a law treatise, at this time when our profession is overwhelmed with books, is to give, if possible, a reason, or at least an excuse, for the publication.

The study of the tax system of any State impresses one with the clear distinction between the taxing power of the State under our complex government, and the construction of the statutes enacted by the State in the exercise of that power. Our States are sovereign in taxation, subject to the restrictions of the Federal Constitution and to the limitations necessarily growing out of our dual form of government. Under the Fourteenth Amendment, the power of the Federal government secures due process of law and the equal protection of the laws in the exercise of this sovereign State authority, so that there is a "Federal question," whereon the Federal jurisdiction may be invoked, in every tax case in which these fundamental rights are claimed to be denied.

Questions of taxation are now engaging the attention of the legislatures and of the courts, as well as of the economists, to a greater extent than ever before. New experiments in taxation are being tried in the attempt to reach the infinite forms of property and business under the complex conditions of modern society. It was said by the Supreme Court of the United States in a recent opinion that it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of govern-

ment, that the objects and modes of taxation have become a matter of special scrutiny.[1] In this case the court held unconstitutional a Federal tax which had been exercised without question at different periods for over a hundred years since the foundation of the government, and said that the delay in presenting such questions was no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.

So great is the diversity in the details of State taxing systems and so many are the cases involved in their construction and application, that the inclusion of this great volume of accumulated case law on taxation in an intelligent form with the different State constitutions and statutes expounded and applied would now require a publication of cyclopedic proportions. Thus in the last annual digest there are nearly one thousand different tax cases digested, many of these involving several distinct points of decision, which are separately digested.

The taxing power of the States under the limitations of the Constitution of the United States and the taxing power of Congress under the grants of the Constitution have been expounded and developed by the Supreme Court of the United States, the supreme arbiter of the Constitution, for more than a century, and it is believed that the time has come when the rules formulated by this tribunal defining the limits of the taxing power, both State and Federal, may be definitely and connectedly stated. These rules are "judge made" law evolved by the court for the complicated conditions of modern business from this gradually developed conception of the relations of the States to the Federal government. Liberal use therefore has been made of quotations from the opinions of the court in formulating and announcing these rules, including not only the

[1] Fairbank *v.* United States, 181 U. S. l. c. 312.

prevailing, but sometimes the dissenting, opinions, as the latter have not been without their use in the development of the law on this subject. Many of these opinions, notably those of Chief Justice Marshall and the late Justices Bradley, Field and Miller, and those of the present members of the court, are valuable contributions, not only to the constitutional law of taxation, but to the practical solution of the vexed and intricate problems of taxation by our dual sovereignties under our complex modern conditions.

It is the aim of this work to show the limitations of the taxing power of the State and of the Federal government so far as these limitations have been declared and expounded by the Supreme Court of the United States. Decisions of the State courts and inferior Federal courts have been cited as applying or illustrating the limitations thus declared. These limitations fix what the State *can* tax. What it *has* taxed must be learned from its own statutes and the decisions of its own courts. What it *ought* to tax is a question for economists and reformers.

To save unnecessary repetition, the Supreme Court of the United States is mentioned as the Supreme Court only, and is thus distinguished from the Supreme Courts of the States, the titles of which include the names of the States. For convenience of reference, the appendix contains the Constitution of the United States and also the most important and illustrative provisions of the respective State constitutions relating to taxation.

I must acknowledge the very efficient services of Mr. McVeigh Harrison of the St. Louis Bar, in general revision, reading proof and preparing index; and also of Mr. William B. Hale, now of the New York Bar, in the collection of State cases, and of Mr. J. Clarence Taussig of the St. Louis Bar in the compilation of State constitutions. I have also been assisted by Mr. Lee M. Edgar in preparing the table of cases; and must acknowledge the consideration

of my law partner, Mr. John F. Green, during the necessary interruption of an active practice by the preparation of this book for the press.

FREDERICK N. JUDSON.

St. Louis, Nov., 1902.

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LAW OF TAXATION.

CHAPTER I.

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§ 1. Taxation and the Constitution of the United States.

The power to tax has been defined as the power in the State to enforce proportional contributions from persons and property for the support of the government and for all public needs. This power is therefore essential to the existence of an organized political community. In the language of the Supreme Court in a recent case,[1] involving the power of taxation delegated to Congress by the Constitution: "The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive."

The original thirteen States, when they became independent Commonwealths after the declaration of independence, exercised this sovereign power of taxation unrestricted by any external authority. It was the absence of this power in the Congress of the Confederation, and its inability to enforce payment by the States of its requisitions upon them, which brought about the failure of the Confederation, and was one of the moving causes in the organization of the Federal Union, under the Constitution of the United States.

This fatal defect in the Articles of Confederation, the inability of Congress to enforce the collection of its revenues, was remedied in the Constitution by giving Congress a

[1] Nicol *v.* Ames, 173 U. S. l. c. 515.

power of taxation, exclusive as to imports, and concurrent with the States in internal taxation, dealing directly in both with the subjects of taxation.[1]

§ 2. The Constitution in relation to the State and Federal power of taxation.

As the government of the United States, under the Constitution, is one of delegated powers, Congress has only such taxing power as the Constitution delegates to it; while the States retain their original powers of taxation, subject to the restrictions which the same instrument imposes upon them. Thus the Constitution acts in the one case as a grant, and in the other as a restraint of power. It is true that the original State sovereignty in taxation was never possessed by the States later admitted into the Union, in the same sense as by the original thirteen. But this relation of the States to the Federal government established by the Constitution is assumed without distinction by all the States admitted to the Union, on the same basis as it existed between the original thirteen States and the central government; for, under the Constitution, all the powers not delegated to the United States by the Constitution are reserved to the States respectively, or to the people.[2] It was said by the Supreme Court in a notable case:[3] "A State in the ordinary sense of the Constitution is a political community of free citizens, occupying a territory of

[1] Thus Mr. Hamilton said in the Federalist, No. 16: "The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means and have a right to resort to all the methods, of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular States."

[2] Constitution, Amendment X.

[3] Texas *v.* White, 7 Wall. l. c. 721.

defined boundaries and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and States which compose it one people and one country."

And again the court said: "Equality of constitutional right and power is the condition of all the States of the Union, old and new."[1] It was decided in that case that the ordinance of 1787, for the government of the Northwestern Territory, and the resolution admitting the State of Illinois into the Union, could not control the powers and authority of the State after her admission, and that on her admission she at once "became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States."

Subject to the restraints imposed by the Constitution, and those growing out of the relations thereby created, the States retain their original taxing power, or more accurately, all the States hold subject to such restrictions the sovereign taxing power, which the original thirteen States exercised prior to the adoption of the Constitution.[2] The constitutional basis of internal taxation in the United States, therefore rests upon the concurrent exercise by two sovereignties of the power of taxation over the same subjects and in the same territory. The exercise by the States of their original power is subject, however, to a further qualification arising out of the supremacy of the Constitution, laws and treaties of the United States, which are made by the Constitution the supreme law of the land.[3]

[1] Escanaba Company *v.* Chicago, 107 U. S. 678. See also Huse *v.* Glover, 119 U. S. 543.

[2] 1 Story on Cons., Sec. 940.

[3] Article VI., Section 2, of the Constitution.

§ 3. The concurrent powers of internal taxation.

When the Constitution was adopted, or, in the words of John Quincy Adams, "extorted from the grinding necessity of a reluctant people," this grant to the Federal government of a concurrent power over internal taxation was jealously and stoutly resisted. The exclusive jurisdiction of the Federal government over imports and customs duties seems to have been recognized as a necessity, but internal taxation, it was claimed, should be left to the States,[1] or the people would be oppressed by an army of Federal tax collectors and crushed by the weight of this double taxation by the State and Federal authority. The Constitution contains no express limitation upon the taxing power of the States except as to imports and exports, and its defenders, notable among them Mr. Hamilton in the Federalist, contended that this left the power of the States over internal taxation unrestrained. Thus he said concerning the supposition that the taxing power of the States was repugnant to that of the Union:[2]—

"It cannot be supported in that sense which would be requisite to work an exclusion of the States. It is, indeed, possible that a tax might be laid on a particular article by a State, which might render it *inexpedient* that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide and might require

[1] See 2 Thorp's Constitutional History of the United States, Book III, for an interesting account of the arguments for and against the Constitution. See also Federalist, Nos. 30 to 36.

[2] Federalist, No. 32.

reciprocal forbearances. It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preëxisting right of sovereignty." [1]

§ 4. Judicial construction of Federal taxing power.

The attention of the fathers in framing the Constitution was therefore not directed to the restraint upon the taxing power of the States growing out of the relations between the States and the Federal government, for no one then foresaw the tremendous expansion of the national commerce and of the functions of the Federal government but their attention was directed to restraints upon the Federal taxing power. This jealousy of the Federal government occasioned the only express restrictions upon its taxing power, to wit, the provision that direct taxes shall be apportioned according to population, the requirement of uniformity as to all duties, imposts and excises, and the prohibition of a tax upon exports from any State, or any preference between ports of the States.[2]

After more than a century of government under the Constitution, the Supreme Court was unable to agree upon a construction of any one of these three restrictions. It

[1] Mr. Hamilton in Federalist, No. 36, in answer to the argument that there would be "double sets of officers" for internal taxation, says that probably "the United States will either wholly abstain from the objects preoccupied for local purposes or will make use of the State officers and State regulations for collecting the additional imposition." He intimated also that the expenses of the States would probably be small and that only a small land tax would be required for their purposes after their then outstanding debts were paid. This discussion of the Federalist as to the concurrent power of taxation was used in McCulloch *v.* Maryland in support of the argument in favor of the power of the State to tax the branch of the National Bank; see reference to same in the opinion of Chief Justice Marshall, *infra*, § 7.

[2] See Constitution, Article I., Sections 8 and 9.

was decided by a bare majority of five to four that the term "direct taxes" did not mean what it had been construed to mean during the one hundred years since the foundation of the government;[1] while upon the application of the uniformity requirement in Federal taxation to the territorial acquisitions of the country, the judges were unable to agree upon any opinion;[2] and only by a majority of one, as in the Income Tax Case, was a decision rendered as to what was a duty upon exports or a preference between ports with reference to these same territorial acquisitions.[3] This inability of the eminent jurists of the Supreme Court to agree in the construction and application of these provisions of the Constitution forcibly illustrates not only the complexity inherent in the adjustment of the concurrent taxing powers of dual sovereignties, but in a broader sense the inadequacy of a written constitution when confronted with conditions and emergencies never contemplated by its framers.

§ 5. Restraints upon State taxation developed by judicial construction.

While the taxing power of the States is thus unrestrained by any express constitutional restrictions, except such as are involved in the exclusive power over foreign commerce and concurrent power in internal taxation given to Congress, there is a very important restraint upon it arising out of the necessary relations between the State and Federal government created by the Constitution, and the supremacy of the Federal power which the Constitution established. Thus it is provided:[4] "This Constitution and the laws of the United States which shall be made in pur-

[1] Income Tax Cases, 157 U. S. 429 and 158 U. S. 601.
[2] Downes v. Bidwell, 182 U. S. 244.
[3] Dooley v. United States, 183 U. S. 151.
[4] Article VI., Section 2, of the Constitution.

suance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

There is no provision in the Federal Constitution prohibiting State taxation of Federal agencies or franchises, or interstate commerce, or protecting from taxation property exempted by contracts of the legislature; but neither is there any express provision in the Constitution whereunder the Federal Supreme Court can declare an Act of Congress or of a State legislature void as violating that instrument, and it is said that foreigners have searched the Constitution in vain to find a recognition of this power.[1] It has in fact been developed by judicial construction from the necessary relation between the legislative power and the court created by the written Constitution.[2]

Thus also by judicial construction from the necessary relation between the power of State taxation and the supremacy of the Federal authority, the great volume of the law of Federal restraints upon State taxation has been developed upon the fundamental principle of the supremacy of the Federal authority, as expounded by the great constructive mind and the masterful reasoning of Chief Justice Marshall.

§ 6. Importance of decision in McCulloch v. Maryland.

The decision in McCulloch *v.* Maryland,[3] decided in 1819, is the foundation of the great principle of Federal supremacy in taxation, which necessarily involves the exemption from State taxation of the agencies of the Federal government. The question before the court was the valid-

[1] See 1 Bryce's American Commonwealth, 346.
[2] Marbury *v.* Madison, 4 Cranch, 110.
[3] 4 Wheaton, 316.

ity of a statute of Maryland requiring the notes of the branch of the United States Bank established in that State to be issued upon stamped paper, subject to a stamp tax levied by the State. There was thus at issue not only the constitutional power of Congress to establish the bank and of the bank to establish its branches, but also the power of the State to tax such branches. It was the first case presented to the court involving the powers impliedly given by the Constitution and the Federal limitations upon the taxing power of the State growing out of the relations between the States and the Federal government created by the Constitution. Counsel for the State of Maryland argued that the principle of concurrent powers in internal taxation, as expounded by the writers in the Federalist, carried with it the right on the part of the States to tax the agencies of the Federal government, and on the part of the Federal government to tax the agencies of the States.

The opinion of Chief Justice Marshall is justly deemed one of the greatest, if not the greatest, of that great jurist, as it certainly is the most far-reaching in its consequences, dealing as it does with the limitations of the sovereign power of both Federal and State governments. It is notable, as are others of his opinions, in that it cites no authorities, for there were none to cite.[1]

§ 7. Opinion in McCulloch v. Maryland.

After holding that Congress had the constitutional power to establish the bank and the bank the right to establish

[1] The report says: "This case involving a constitutional question of great public importance, and the sovereign rights of the United States and the State of Maryland, and the government of the United States having directed their Attorney-General to appear for the plaintiff in error, the court dispensed with its general rule, permitting only two counsel to argue for each party." The case was argued by Mr. Webster, Mr. Pinckney and Attorney-General Wirt for the United States Bank, and by Mr. Hopkinson, Mr. Jones and Attorney-General Martin for the State.

its branch in the State, it was held further that the State, within which the branch was located, could not, without violating the Constitution, tax that branch. The State government had no right to tax any of the constitutional means employed by the government to execute its constitutional powers, and no power by taxation or otherwise to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government. Thus he said: —

"That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution that its capacity to withdraw any subject from the action of even this power, is admitted." After conceding that there was no express prohibition of such a tax in the Constitution, the court says: —

"There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds."

And further, page 431: —

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. * * * If the States may tax one instrument,

employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States. * * * The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."

Reference was made in the opinion to the arguments of the Federalist, and it was held that they were intended to prove the fallacy of apprehensions of an unlimited power of taxation. He said: —

"Had the authors of these excellent essays been asked, whether they contended for that construction of the Constitution, which would place within the reach of the States those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit that their answer must have been in the negative."

He said further that the right of the State to tax the banks chartered by the general government was not the same as the right of the national government to tax the banks chartered by the State: —

"The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole — between the laws of a government declared to be supreme, and those of a govern-

ment which, when in opposition to those laws, is not supreme."

The opinion concluded as follows, pp. 436, 437: —

"The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

"We are unanimously of the opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

"This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is consequently a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

§ 8. Osborn v. United States.

A few years later, in 1824, the court was asked[1] to reconsider so much of this opinion as held that the States had no rightful power to tax the banks of the United States. It was contended that banking is a private business, the essential character of which was not changed by the fact that the parties engaging therein were incorporated under

[1] Osborn *v.* Bank of the United States, 9 Wheaton, 738.

the Act of Congress, and it was therefore not properly an instrumentality of the government in the sense that the mint or post office was. But the court replied that while banking was a private business, the Bank of the United States was not created for its own sake or for private purposes, and to tax its facilities, its trade and occupation, was to tax the bank itself. The tax in this case was one levied by the State of Ohio taxing the banks of the United States fifty dollars on each office of discount and deposit in the State. The court said, l. c., page 867: —

"Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation which was necessary to make it a fit instrument for the objects for which it was created, the court adheres to its decision in the case of McCulloch *v.* Maryland, and is of opinion that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States made in pursuance of the Constitution, and therefore void."

§ 9. **Brown v. Maryland.**

This principle of Federal supremacy in relation to the taxing power of the States was again emphatically stated in 1827, in the great case of Brown *v.* Maryland.[1] In answer to the argument that the construction given by the court to the power to regulate commerce would abridge the power of the State to tax its own citizens or their property within its territory, the court, Chief Justice Marshall, said, page 448: —

"We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be

[1] 12 Wheaton, 419.

used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and State governments, as a vital principle of perpetual operation. It results necessarily from this principle that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce.

§ 10. United States securities not taxable by States.

This principle was first applied to the attempted State taxation of Federal securities in 1829, in Weston *v.* Charleston.[1]

The city of Charleston passed an ordinance, taxing, with other personal effects, the six and seven per cent stock of the United States, 25 cents on every $100. This tax having been sustained by the State courts of the State, was taken to the Supreme Court of the United States and there adjudged unconstitutional. It was claimed that a tax on stock came within the exception stated in the case of McCulloch *v.* Maryland, but the court held the contrary, saying, l. c., page 468: —

"The American people have conferred the power of borrowing money on their government, and by making that

[1] 2 Peters, 450; 7 L. C. P. 481.

government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised."[1]

§ 11. Legal tender notes, etc., made taxable by Act of Congress.

The principle thus established was applied to certificates of indebtedness issued by the United States to creditors of the government for supplies furnished to aid in carrying on the Civil War;[2] also to United States notes, that is, treasury notes or greenbacks constituting the circulating medium of the country, as these were held to be engagements to pay dollars and therefore obligations of the national government and exempt from State taxation.[3] Gold and silver certificates issued by the government,[4] and the notes issued by national banks, organized under Act of Congress, were also held thus exempt.[5] But this exemption of national bank notes and United States legal tender notes and certificates of the United States, circulating as currency, was repealed by Act of Congress in 1894.[6]

[1] Justices Johnson and Thompson dissented, the former saying, l. c. p. 473: "Why should not the stock of the United States, when it becomes mixed up with the capital of its citizens, become subject to taxation in common with other capital? Or why should one who enjoys all the advantages of a society purchased at a heavy expense and lives in affluence upon an income derived exclusively from interest on governmental stock, be exempted from taxation?"

[2] The Banks *v.* The Mayor, 7 Wall. 16.

[3] Bank *v.* Supervisors, 7 Wall. 26.

[4] State *v.* Mayor, 63 N. J. L. 547.

[5] See Horn *v.* Green, 52 Miss. 452; but *contra* Montgomery County Commissioners *v.* Elston, 32 Ind. 27; Ruffin *v.* B. of Com., 69 N. C. 498.

[6] Act of August 13, 1894, providing "that circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency and gold, silver or other

§ 12. Bonds of District of Columbia exempted.

Bonds issued by the District of Columbia under authority of Act of Congress, which were to be paid in part by taxation of property within the District and in part by appropriations of Congress, were held to be lawfully exempted by Congress from taxation by State or municipal authority.[1] It was contended that Congress had no power to declare this exemption. But the court held, in an interesting opinion by Judge Taft, after careful review of the authorities, that where Congress lawfully directs the issue of evidences of indebtedness in the exercise of any power derived by it from the Constitution, whether it be by virtue of the power to borrow money on the credit of the United States, or any other grant, such evidences of debt are exempt from State taxation, or at least may be exempted therefrom, if Congress sees fit to give them this quality. The suit was upon municipal bonds issued to borrow money to pay the debts incurred in improving and beautifying the city of Washington, the capital of the nation. The court held that the bonds, so authorized by Congress, were issued for an essentially national purpose, and that in effecting that purpose by means of the express constitutional power to borrow money on the credit of the United States, the legislative power of Congress in thus exempting them was as territorially extensive as the exercise of the power for any other constitutional purpose. Hence it operated in each State upon the taxing officers of the State and upon the government thereof, and expressly forbade the taxation of the bonds.

coin, shall be subject to taxation as money on hand or on deposit, under the laws of any State or Territory: *Provided*, that any such taxation shall be exercised in the same manner and at the same rate that any such State or Territory shall tax money or currency circulating as money within its jurisdiction." It was also provided that the act should not change the laws relating to the taxation of national bank shares. See *infra*, § 264.

[1] Grether *v.* Wright, 23 C. C. A. 498.

§ 13. Statutory declaration of exemption not essential.

It has been customary in acts authorizing the issue of obligations of the United States to expressly declare such securities exempt from State taxation. But such statutory enactment or declaration is not the foundation of the exemption. It is based upon the essential relation borne by the government of the United States to the States. The exemption, therefore, grows out of the character of the securities and their relation to the national government, and does not depend upon any specific declaration in the act authorizing their issue.

§ 14. Salaries of U. S. officials not taxable.

In 1842 the same principle was applied to the case of an officer of the United States in Dobbins *v.* Erie County.[2] The State of Pennsylvania assessed a tax on all offices and posts of profit, and the attempt was made to collect it from the captain of a United States revenue cutter at the station on Lake Erie. The Supreme Court of Pennsylvania sustained this tax and distinguished the case from Weston *v.* Charleston and McCulloch *v.* Maryland, on the ground that the officer was a taxable person. But the Supreme Court of the United States, in an opinion by Justice Wayne, held that there was no distinction. The affairs of the national government are necessarily carried on by agents who must be compensated, and if the State could tax the salaries of such agents, it would in effect give the State a revenue out of the United States and would reduce the compensation fixed by the United States to below what it adjudged was reasonable for the service.

[1] Van Brocklin *v.* Tennessee, 117 U. S. 151.

[2] 16 Peters, 435, and 10 L. C. P. 1022. See also Ulsh *v.* Perry County, 7 Pa. Dist. Rep. 488, holding the act of Pennsylvania of April 15, 1834, taxing a postal clerk, invalid.

§ 15. State tax upon passengers in mail coaches invalid.

The Cumberland road was constructed by the Federal government through the States of Maryland, Virginia, Pennsylvania and Ohio. Acts were passed by the several States, and accepted by the United States, providing that no toll should be received or collected from any wagon or carriage employed with the property of the United States, or any cannon or military store belonging to the United States. It was held that wherever a carriage carried the mail upon this road, although it carried other property and passengers also, it must be considered to be laden with the property of the United States and therefore exempted from payment of State toll.[1]

The regulation of the Post Office Department required the coaches to carry passengers for the security of the mails. A toll of four cents imposed by the State of Maryland upon every passenger for every space of ten miles in the passenger or mail coaches was adjudged inconsistent with the compact made with the United States.[2]

§ 16. Taxation of banks holding U. S. securities invalid.

In Bank of Commerce *v.* New York City, decided in 1862,[3] the principle that Federal securities are exempt from State taxation, laid down in Weston *v.* Charleston, was extended to banks organized under the laws of New York, a part of whose stock was invested in Federal securities. The capital of the bank was then taxed upon a valuation like the property of individuals, and the court held that the case was controlled by the principle of the Weston case. The tax was therefore adjudged invalid so far as the

[1] Searight *v.* Stokes, 3 Howard, 151; 11 L. C. P. 537; Neil *v.* Ohio, 3 Howard, 720; and 11 L. C. P. 800.

[2] Achison *v.* Huddleson, 12 Howard, 293; and 13 L. C. P. 993.

[3] 2 Black, 620.

property of the corporation was invested in United States securities. Subsequent to this decision, the State of New York enacted another statute that all banks should be subject to taxation on a valuation equal to the amount of their capital stock paid in, or subject to be paid in, and their surplus earnings, and it was held by the New York Court of Appeals that this did not impose a tax upon the United States securities in which some of the banks had invested all and others a part of their capital. But the Supreme Court [1] held that the tax was still upon the Federal securities; that the tax on the capital and surplus was a tax on the property of the bank, and, therefore, upon the securities in which that property was invested; that it was not upon the franchise of banking or privilege of doing a banking business, but upon the property of the bank, *i. e.*, upon the capital representing its property.

§ 17. Corporate franchise tax distinguished from property tax.

But it was later held in a series of cases reported in the 6th Wallace that, where the State tax was upon the corporate franchise, and not upon the property of the corporation or upon the stock as representing the property, the tax was not invalidated by reason of the investment of the property of the corporation in exempted Federal securities. This principle was applied to a statute of Connecticut, providing that savings banks should pay a tax of three-fourths of one per cent on their deposits; [2] to a Massachusetts tax which was levied on the average amount of deposits during a period of six months; [3] and to a Massachusetts corporation tax [4] which required all corporations having a capital

[1] Bank Tax Case, 2 Wallace, 200.

[2] Society for Savings *v.* Coite, 6 Wallace, 594.

[3] Provident Institution *v.* Massachusetts, 6 Wallace, 611.

[4] Hamilton Company *v.* Massachusetts, 6 Wallace, 632. Chief Justice Chase and Justices Grier and Miller dissented in these cases.

stock divided into shares to pay a tax of a certain percentage upon the excess of the cash market value of their stock over and above the value of their real estate and machinery. In this last case the tax was held valid, although the surplus capital of the corporation was invested in exempted Federal securities.

This distinction was again brought before the court in the case of a New York statute which levied a tax upon the "corporate franchise or business" of a company, at the rate of one-quarter of a mill upon the capital stock for each one per cent of dividend of six per cent or over; also eight-tenths of one per cent upon the premiums of fire and marine insurance companies. A fire insurance company claimed that it was entitled to a deduction of that portion of its capital invested in bonds of the United States. This contention was overruled by the New York Court of Appeals,[1] and its judgment was at first affirmed in the United States Supreme Court by a divided court.[2] A rehearing was granted, the case reargued and the judgment again affirmed.[3]

The court held that the tax was not levied upon the capital stock nor upon the bonds of the United States composing a part of the stock, and that it was properly designated as one upon the corporate franchises or business.

§ 18. Taxable corporate franchise defined.

And as to the meaning of the term "corporate franchise or business," the court said, at page 599: —

"By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commer-

[1] 92 New York, 328.

[2] Home Ins. Co. *v.* N. Y., 119 U. S. 129.

[3] Home Ins. Co. *v.* N. Y., 134 U. S. 594, Justices Miller and Harlan dissenting.

cial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a Federal tribunal." [1]

[1] See also § 30.

§ 19. Taxation of shares of corporations holding Federal securities.

As will be hereafter seen, *infra*, § 274, it was held in the case of the national banks, that as the act of Congress under which they were incorporated authorized the taxation of their shares, it is immaterial that their capital is partially or wholly invested in United States bonds, as the tax is upon the individual shares and not upon the capital or property of the bank as such. This distinction, or rather the judicial recognition of the fiction distinguishing the property of the shareholders from the property of the corporation, has also been applied by the court, as will be hereafter seen, in reference to contracts of exemption from taxation, see *infra*, § 94.

It would seem that the same principle would be applicable to the case of any Federal securities or rights of property granted by the United States, as in the case of patent rights, *infra*, § 33, and that the tax is valid if levied upon the corporate shares, or as a franchise tax upon the corporation. A ready means of taxing United States securities is thus afforded, by naming the tax as one upon the franchise of the company, or upon the corporate shares, instead of upon the property or capital of the corporation, although in fact the tax, whatever it is called, is upon substantially the same property, in both cases.

§ 20. State tax upon interstate passengers invalid.

In Crandall *v.* Nevada,[1] the court adjudged invalid a capitation tax levied by the defendant of one dollar upon every person leaving the State by any railroad, stage coach or other carrier, to be paid by the corporations or persons carrying the passengers. The court, in an opinion by Justice Miller, expressed regret that such a question should

[1] 6 Wallace, 35.

be submitted to it with no brief or argument on the part of the plaintiff in error, and said that the case was one of importance, for it involved the right of the State to levy a tax upon persons residing within its jurisdiction who might wish to go out of it, and upon persons residing out of it who might have occasion to pass through it. The statute was adjudged void, not because it was a violation of any specific clause of the Constitution, although two of the judges based their concurrence on the ground that it was an attempted regulation of commerce, but because it was a tax inconsistent with the relations of the State to the Federal government. The United States, as incident to the power to prosecute and declare war, has a right to raise and transport troops through and over the territory of any State of the Union. The citizens of each State have a right to visit the seat of government, to have free access to the seaports of the country and so on, and this right is independent of the law of any State over whose soil they must pass in the exercise of it.

§ 21. Lands and other property of U. S. not taxable by States.

It may be said in general terms that all the property of the United States held for Federal purposes, as for public buildings or reservations, including the public domain, is exempt from State taxation.[1] But this exemption no longer exists when the right to a conveyance is secured by certificate of entry or purchase, even though no patent has been issued.[2] The equitable title must, however, be fully vested without any more to be paid or any act to be done going to the foundation of the right, before the

[1] Van Brocklin *v.* Tennessee, 117 U. S. 151.

[2] Witherspoon *v.* Duncan, 4 Wall. 210; Carroll *v.* Safford, 3 Howard, 441; Railway Co. *v.* Prescott, 16 Wallace, 603.

lands can become taxable.[1] Until a Spanish grant has been segregated from the public domain by survey properly approved, it is not subject to taxation by State authority.[2]

This subject of the exemption of property of the United States from State taxation was very fully discussed in Van Brocklin *v.* State of Tennessee.[3] Lands within the confines of defendant purchased by the Federal government at a sale for direct taxes levied by it in 1862, and afterwards sold by it or redeemed by the former owner, were exempt from State taxation while held by the United States.[4] The court says in its opinion that the necessity for exempting all the property of the United States from State taxation has been recognized by the highest courts of several of the States, and also in the statutes of most of them. It remarked, however, that such a provision in the State laws is not the foundation of the exemption, but is inserted only from abundant caution and because the assessment of taxes is to be made by local officers skilled in the valuation of property, but ignorant of legal distinctions.[5] The general principle is thus laid down at pages 174 and 175: —

"In short, under a republican form of government, the whole property of the State is owned and held by the State for public uses, and is not taxable, unless the State which owns and holds it for those uses clearly enacts that it shall share the burden of taxation with other property within its jurisdiction. Whether the property of one of the States of the Union is taxable under the laws of that State de-

[1] Railway Co. *v.* Prescott, 16 Wallace, 603; Wisconsin Central Railroad Co. *v.* Price County, 133 U. S. 496.

[2] Robertson *v.* Sewell, 31 C. C. A. 107.

[3] 117 U. S. 151.

[4] But after sale under a confiscation, the lands are subject to State taxation, see Newby *v.* Brownlee, 23 Fed. Rep. 320.

[5] Page 171, where there is a statement of the express exemption of property of the United States in the general tax acts of each State.

pends upon the intention of the State as manifested by those laws. But whether the property of the United States shall be taxed under the laws of a State depends upon the will of its owner, the United States, and no State can tax the property of the United States without their consent.''

And the general power of the United States in the acquisition of lands in a State is thus stated at page 154: —

"So the United States, at the discretion of Congress, may acquire and hold real property in any State, whenever such property is needed for the use of the government in the execution of any of its powers, whether for arsenals, fortifications, light-houses, custom-houses, court-houses, barracks or hospitals, or for any other of the many public purposes for which such property is used; and when the property cannot be acquired by voluntary arrangement with the owners, it may be taken against their will, by the United States, in the exercise of the power of eminent domain, upon making just compensation, with or without a concurrent act of the State in which the land is situated.'' [1]

§ 22. Limitations of exemption of U. S. lands, etc.

But the extent of the exemption of lands in a State acquired by the United States may be limited by inserting terms in the cession by the former which the latter agrees to. Thus in a grant by Kansas of the Fort Leavenworth military reservation to the United States, the State reserved the right to tax the railroads, bridges and other corporations within the territory ceded, and it was held that this right could be enforced against the property and franchises of a railroad company within the reservation.[2]

Where land was acquired by the United States for the

[1] Chappell *v.* United States, 160 U. S. 510.

[2] Ft. Leavenworth Railroad Co. *v.* Lowe, 114 U. S. 525.

erection of a post office in Kansas City, Missouri, it was held that the moment the government acquired the property, its jurisdiction over it became absolute and exclusive, and there was no power thereafter to enforce the lien for taxes which theretofore had attached under the State laws.[1] So the exemption of land from taxation continues during the interim between the filing of an original land warrant and the filing of a substitute warrant issued in place of the original, canceled on account of forgery in the assignment.[2]

§ 23. Lands granted to railroads, when taxable.

Where a railroad land grant was made by Congress, providing that the land should not be conveyed to the company until the United States treasury was paid the cost of surveying, selecting and conveying the same, it was held by the Supreme Court that this exempted the lands from State or territorial taxation until the required payment was made. The court said it was aware that the company might take advantage of this principle and neglect to pay the costs in order to avoid taxation, but that the remedy was with Congress.[3] Congress thereupon passed the Act of July 10, 1886, providing that surveyed but unpatented lands on which the costs of survey had not been paid, included in railroad land grants, should be subject to State taxation.[4]

Where public lands are granted to a State by Congress to aid in the construction of a railway, the grantee cannot tax the lands while it holds them as trustee for the United States, but they can be taxed after they have been sold within the meaning of the Act of Congress.[5]

[1] Bannon *v.* Burns, 39 Fed. Rep. 892; Cir. Ct. W. Dist. of Mo.

[2] Pitts *v.* Clay, 27 Fed. Rep. 635; U. S. Cir. Ct. Nor. D. Iowa.

[3] Nor. Pac. R. R. Co. *v.* Traill County, 115 U. S. 600; Railway Co. *v.* McShane, 22 Wall. 444.

[4] Cen. Pac. R. R. Co. *v.* Nevada, 162 U. S. 512.

[5] Tucker *v.* Ferguson, 22 Wall. 527. See also Hunnewell *v.* Cass Co., 22 Wall. 464.

§ 24. **The title essential for State taxation.**

Lands granted to railroads by the United States become taxable when the equitable title of the company is perfected by its compliance with the requirements of the statute, which are the conditions precedent to its right to a patent, whether the costs of survey have been paid or not.[1] Thus, it was decided that the possessory claim of the Central Pacific Railroad to its land grant in the State of Nevada was subject to taxation, notwithstanding the fact that the lands might thereafter be determined to be mineral lands, and so excluded from the operation of the railroad grant. As long as the company asserted a possessory claim to the lands, a corresponding obligation was implied to pay the taxes upon them. The court further decided that, where a State statute defined the term "real estate," as including any possessory right or claim in the land, and accordingly listed such right or claim for taxation, this involved no Federal question, since it appeared that express authority had been given by Congress to tax the lands.

The court said in another case that the right of the State to tax was not defeated by the fact that there was a controversy about the character of some of the lands. If there is an uncertainty it must be resolved by the railroad.[2] The fact that the mineral lands have been reserved to the United States does not prevent the vesting of title in other lands, and the latter become taxable notwithstanding the reservation. The reports of the United States surveyors that lands are agricultural and not mineral is sufficient, as there must be a time for determining once for all what lands are mineral. The court held that the term "min-

[1] Central Pac. R. R. Co. *v.* Nevada, 162 U. S. 512, Justice Field dissenting.

[2] Northern Pac. R. Co. *v.* Myers, 172 U. S. 589; Justices Brewer, White, Shiras and Peckham dissenting.

eral lands" in such a reservation meant lands known to be such at the time the company acquired its title.[1]

§ 25. Ores from mineral lands taxable.

Although the title to mineral lands may remain in the United States, the ores, when dug or extracted under a mining claim, are free from any claim or title of the United States, and as personal property they are subject to State taxation in like manner as other personal property. This was ruled in relation to the mining laws of Nevada of 1871, taxing mining ores.[2]

§ 26. Indian Reservations not taxable.

In the case of the Kansas Indians, the court held that the State of Kansas had no right to tax lands held in severalty by individual Indians, under patents issued to them by virtue of treaties made with their tribes.[3] The fact that the primitive habits and customs of the tribe had been largely broken into by their intercourse with the whites, did not authorize the State government to regard the Indians as subject to its laws. Where lands are exempt from levy, sale and forfeiture, they are exempt from ordinary proceedings for the collection of taxes. The Indian Reservations reserved to the Indians in their tribal relations by the United States, cannot be taxed by the State. Thus it was held in the case of the New York Indians,[4] reversing the New York Court of Appeals, that the State had no power to tax the land of the Indians, their ancient and native home, the enjoyment of which had been secured to them by treaty with the Federal government, with the

[1] Nor. Pac. R. Co. *v.* Walker, 47 Fed. Rep. 681; Davis *v.* Weidbolt, 139 U. S. 507; Northern Pac. R. R. *v.* Wright, 4 C. C. A. 193.

[2] Forbes *v.* Gracey, 94 U. S. 762.

[3] 5 Wallace, 737.

[4] 5 Wallace, 761.

assurance that the lands should remain theirs until they chose to sell them. And where the Indians, under an arrangement approved by the United States, agreed to sell their lands to private citizens and to give possession after a term of years, the taxation of the land before the end of that term was premature. A sale of land in an Indian Reservation for State taxes is void.[1] But the exemption ceases after the Indian alienates his land to a citizen.[2]

This exemption from State taxation however does not exist where inconsistent with the terms of a treaty of the United States with the tribe. This was held in the case of a half-blood member of a tribe who was not a member of a tribal organization existing in the State as a distinct political community, and who had received patents from the United States for lands in fee simple.[3]

§ 27. Cattle, etc., of non-Indians on Indian Reservation taxable.

Cattle owned by individuals or corporations, and pastured upon an Indian reservation, under a contract with the Indians, sanctioned by the United States, are taxable by the State, although its Constitution contains a disclaimer of all right of any kind in the land of any Indian tribe until the Indian right is extinguished.[4]

The same principle was applied by the Supreme Court in the case of non-resident owners of cattle grazing in parts of the Osage Indian Reservation in Oklahoma, which were assessed for taxation by that Territory. It was claimed that this tax was invalid on the ground that the Indians were directly and vitally interested in the property. But

[1] Swope *v.* Purdy, 1 Dillon, 350.

[2] Peck *v.* Miami County, 4 Dillon, 371.

[3] Pennock *v.* Commissioners, 103 U. S. 44.

[4] Truscott *v.* Hurlbut Land & Cattle Co., 19 C. C. A. 374, Ninth Circuit.

the court held [1] that this was too remote and indirect to be deemed a tax upon the lands or privileges of the Indians, and that it was immaterial that the cattle were not in any organized county. The tax was levied only upon the personal property,and this was a matter of detail within the legislative discretion.

Where a railroad, chartered under the laws of a Territory, receives a grant from Congress of a right of way over the Indian Reservation within the Territory, that part of it within the Reservation is subject to taxation by the territorial government.[2]

The fact that an Indian post trader is licensed by the government to trade with the Indians does not exempt his stock in trade from State taxation, such trader being a mere licensee, and not an agent of the government.[3]

§ 28. State taxation of railroads incorporated by the United States.

The Union Pacific Railroad Company was organized under Act of Congress, and there was no provision therein respecting taxation of it by the States through which the road should run. It was held in Thomson *v.* Pacific Railroad [4] that the principle decided in McCulloch *v.* Maryland, did not warrant the exemption of the property of this railroad in the State of Kansas from State taxation, and that there was a clear distinction between the means employed by the government and the property of agents employed by the government, although it was conceded that some of the reasoning in the case of McCulloch *v.* Maryland seemed to favor the broader doctrine. In this case the

[1] Thomas *v.* Gay, 169 U. S. 264. See also Wagoner *v.* Evans, 170 U. S. 588.

[2] Maricopa & Phoenix R. R. Co. *v.* Arizona, 156 U. S. 347.

[3] Cosier *v.* McMillan, 22 Mont. 484.

[4] 9 Wallace, 579.

railroad company was originally incorporated by the legislature of the Territory of Kansas, and subsequently by the State of Kansas, and had been authorized to connect with lines constructed by the company incorporated under Act of Congress. Thus the corporation in this case was a State corporation entitled to certain benefits and subject to certain duties under the legislation of Congress. The court said by Chief Justice Chase, l. c., page 590: —

"We do not think ourselves warranted, therefore, in extending the exemption established by the case of McCulloch *v.* Maryland, beyond its terms. We cannot apply it to the case of a corporation deriving its existence from State law, exercising its franchise under State law, and holding its property within State jurisdiction and under State protection."

But a few years later the question was directly presented as to the taxability under State law of the property of the Union Pacific Railroad Company incorporated under Act of Congress. The property of the company was listed for taxation in Lincoln County, Nebraska, and a bill was filed to enjoin the collection of the tax. It was strongly urged that the Thomson case did not control, because that company was incorporated by Kansas, while the company in this case was incorporated by Act of Congress. But the court held[1] that this did not present any reason for the application of a rule different from that which was applied in the former case, saying, at p. 36: —

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the gov-

[1] Railroad Co. *v.* Peniston, 18 Wallace, 5.

ernment as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

Justice Swayne concurred on the ground that Congress had not given the exemption claimed.[1]

In a later case the same principle was applied to the taxability of the property of the Western Union Telegraph Company, a State corporation, but exercising rights conferred by Congress.[2]

§ 29. Railroad franchises granted by United States not taxable.

But while the property used by private agencies employed by the Federal government is taxable by State authorities unless exempted by Act of Congress, franchises conferred by Congress are not taxable. Thus the assessment by the State of California upon the Pacific railroads incorporated by Act of Congress were held void,[3] because the franchises granted by the United States government were included in the valuation. The court pointed out that in the Thomson case and the Peniston case, the tax was upon the property of the company, and not upon the franchises or operations,

[1] Three Justices, Bradley, Field and Hunt, dissented; Justice Bradley saying in his dissenting opinion, p. 50: —

"If the roadbed may be taxed, it may be seized and sold for non-payment of taxes — seized and sold in parts and parcels, separated by county or State lines — and thus the whole purpose of Congress in creating the corporation and establishing the line may be subverted and destroyed.

"In my judgment, the tax laid in this case was an unconstitutional interference with the instrumentalities created by the national government in carrying out the objects and powers conferred upon it by the Constitution."

[2] Western Union Tel. Co *v.* Massachusetts, 125 U. S. 530.

[3] California *v.* Pacific R. R. Co., 127 U. S. 3.

and that while the State could tax the "outside, visible property of the company" situated within its jurisdiction, it could not tax the franchises which were the grant of the United States. Justice Bradley in his opinion gives the following definition of a franchise, pp. 40–41:—

§ 30. Definition of United States franchise.

"What is a franchise? Under the English law Blackstone defines it as "a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject." 2 Bl. Com. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative

authority. Corporate capacity is a franchise. The list might be continued indefinitely."

It was said further that, in view of this description of the nature of a franchise, it followed that such a grant by Congress could not be taxed by a State without the consent of Congress, and that the taxation of a corporate franchise merely as such was the exercise of an authority somewhat arbitrary in its character, as it had no limitation but the discretion of the taxing power. "The valuation of a franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose, or without any valuation of the franchise at all the tax may be arbitrarily laid." It was therefore held that the levying of such a tax by the State on a franchise granted by Congress was not only derogatory to the dignity but subversive of the power of the government and repugnant to its paramount authority.

It will be observed that this definition of a franchise is made to show that from its nature a franchise granted by Congress could not, without its consent, be taxed by a State, while the definition of a corporate franchise in the Home Insurance Company case, *supra*, § 18, was given to show that it was a property right granted by the State, and therefore within the taxing power of the State.

§ 31. Intangible and tangible property of railroads incorporated by U. S. taxable.

But it is only the franchises granted by Congress which are not taxable by State authority. The *intangible*, as well as the *tangible property*, of the company is subject to State taxation, and the decision of the Supreme Court of the State that the franchises taxed are franchises granted by the State is conclusive upon the Federal court.[1] The

[1] Central Pacific R. R. Co. *v.* California, 162 U. S. 91.

court says in the case last cited, after reviewing the decisions, at page 125: —

"It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a State may tax the property of the agents, subject to the limitations pointed out in Railroad Co. *v.* Peniston, Van Brocklin *v.* Tennessee, 117 U. S. 151, 177.

"Of course, if Congress should think it necessary for the protection of the United States to declare such property exempted, that would present a different question. Congress did not see fit to do so here, and unless we are prepared to overrule a long line of well-considered decisions the case comes within the rule therein laid down. Although in Thomson's case it was tangible property that was taxed, that can make no difference in principle, and the reasoning of the opinion applies.

"Under the laws of California plaintiff in error obtained from the State the right and privilege of corporate capacity; to construct, maintain and operate; to charge and collect fares and freights; to exercise the power of eminent domain; to acquire and maintain right of way; to enter upon lands or waters of any person to survey route; to construct road across, along or upon any stream, watercourse, roadstead, bay, navigable stream, street, avenue, highway or across any railway, canal, ditch or flume; to cross, intersect, join or unite its railroad with any other railroad at any point on its route; to acquire right of way, roadbed and material for construction; to take material from the lands of the State, etc., etc.

"It is not to be denied that such rights and privileges have value and constitute taxable property."

§ 32. Letters patent and copyrights.

Letters patent[1] and copyrights[2] granted by the United States have been held to be governed by the same principle. Thus a State cannot require a license for the use of patent rights within its jurisdiction, as such requirement is a violation of the rights of the patentee under the Federal law.[3] But in the matter of patents and copyrights a distinction, analogous to that made in the case of railroad franchises and property, is taken between the right of discovery and the right of property in the fruit of the discovery. Thus in the language of the Supreme Court,[4] the use of the tangible property which comes into existence by the application of the discovery protected by the patent, is not beyond the control of State legislation simply because the patentee obtains a monopoly in his discovery. And in a later case [5] the court said, l. c., page 347: —

"The right conferred by the patent laws of the United States does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the State. It is only the right to the invention or discovery, the incorporeal right, which the State cannot interfere with."

This distinction was applied by the Supreme Court of Pennsylvania,[6] to the case of a lessee of the American Bell Telephone Company, who was held to be taxable by the State on his interest in the telephone instruments, leased

[1] State *v.* Butler, 3 Lea (Tenn.) 222; People *v.* Assessors, 156 N. Y. 417, and 42 L. R. A. 290; Commonwealth *v.* Electric Co., 151 Pa. 265.

[2] People *v.* Roberts, 159 N. Y. 70, 45 L. R. A. 126; People *v.* Knight, 73 N. Y. Supp. 745; People *v.* Harkness, 44 N. Y. Sup. 51.

[3] Commonwealth *v.* Petty, 96 Ky. 452, and 29 L. R. A. 786.

[4] Patterson *v.* Kentucky, 97 U. S. 501.

[5] Webber *v.* Virginia, 103 U. S. 344.

[6] Commonwealth *v.* Central D. & P. Co., 145 Pa. 121.

under a contract granting the exclusive use for a term of years. The court said, l. c., p. 130: —

"The distinction was between the incorporeal rights secured by letters patent and the tangible commodity or finished product, which is its fruit. This finished product or fruit is merchandise, whether it takes the form of a patent reaper, a power printing press, a fountain pen, a pencil sharpener, or an instrument called a telephone." [1]

§ 33. Corporate capital invested in patent rights.

Where the corporate capital is invested in patent rights, it would follow from the rule applied in the case of government securities that the validity of the tax depends upon whether it is upon corporate property or the stock as representing that property, and that if it is upon either, the value of the patent rights must be deducted, as in the case of Federal securities; but otherwise if the tax is upon the corporate franchise, or upon the shares of stock to the holders. Thus in a Maryland case, it was held that as the tax was levied upon the owners of the corporate shares, it was immaterial what the assets or other property were, which made up the value of the shares.[2]

§ 34. State tax on bequests to United States.

A State has the power to levy an inheritance tax upon the right of inheritance, which is in effect a limitation upon the power of the testator to bequeath his property to whom he pleases. The tax is not upon the property, but upon its transmission by will or descent. This principle was first decided in an interesting case from New York, where a testator devised all his property to the United States government, and the question was raised whether

[1] See also Commonwealth *v.* Brush Electric Light Co., 145 Pa. 147.

[2] Crown Cork & Seal Co. *v.* Maryland, 87 Md. 687. But see Commonwealth *v.* Phila. Co., 157 Pa. St. 527.

the State had the power to tax bequests made to the United States. The court held that it had such power and that the tax must be paid by the United States before it could receive the legacy.[1] It was also held in this case that the Federal government was not organized for a religious, charitable or reformatory purpose within the meaning of the New York statute exempting such corporations from paying the tax, and that the exemption was not intended to apply to a purely political or government corporation like the United States.

§ 35. United States securities not exempt from State inheritance tax.

In a later case[2] the court held that a legacy of United States bonds was not exempt from the inheritance tax laws of New York, although it appeared on the face of the bonds that they were exempted from taxation in any form by State authority. It was urged that such a tax impaired the borrowing power of the government. But the court held that this was too remote in effect to make the statute invalid, and that the argument would apply equally to State taxation of corporate franchises, measured by the value of the corporation's property composed in whole or part of United States bonds. After an exhaustive review of the decisions as to the nature of an inheritance tax, the court said, l. c. page 134: —

"We think the conclusion, fairly to be drawn from the State and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing;

[1] United States *v.* Perkins, 163 U. S. 625.

[2] Plummer *v.* Coler, 178 U. S. 115, Justice White dissenting.

and that the incidental fact that such property is composed in whole or in part of Federal securities does not invalidate the tax or the law under which it is imposed.'

§ 36. Treaty-making power and State taxation.

Treaties made under the authority of the United States, as well as the Constitution and laws of the United States, are the supreme law of the land, Article VI., Section 2. But, it would seem, a treaty made by the United States with a foreign country cannot, any more than a statute, control the State in its taxation of the subjects of taxation within its jurisdiction, and that, where the treaty contemplates action by a State upon a subject within its jurisdiction, the State must itself accept the terms of the treaty. This was illustrated in the case of the inheritance tax law of Louisiana, but the point was not definitely decided by the Supreme Court. The laws of Louisiana imposed a tax of ten per cent on the value of all property inherited in that State by any person not domiciled there and not being a citizen of any State or Territory of the United States. The treaty with France, proclaimed August 12, 1853, provided that in all States of the Union, whose laws permitted, so long and to the same extent as said laws should remain in force, Frenchmen should enjoy the right of possessing personal and real property in the same manner and to the same extent as citizens of the United States, and that in no case should they be subjected to taxes on transfers, inheritances or any others, different from those paid by citizens of the United States. A French subject inheriting a Louisiana estate from his sister who died prior to the proclamation of the treaty, contested the payment of this tax. The Supreme Court in affirming the judgment of the Supreme Court of Louisiana,[1] said, through Chief Justice

[1] Prevost *v.* Grenaux, 19 How. 1. The courts of Louisiana seem to have recognized rights of aliens under treaty stipulations with reference to the inheritance tax, see Succession of Rixner, 48 L Ann. 552, 32 L. R. A. 177.

Taney, that the law applied to cases where the right to inherit subsequently accrued, but added l. c., p. 7: —

"In affirming this judgment, it is proper to say that the obligation of the treaty and its operation in the State, after it was made, depend upon the laws of Louisiana. The treaty does not claim for the United States the right of controlling the succession of real or personal property in a State. And its operation is expressly limited 'to the States of the Union whose laws permit it, so long and to the same extent as those laws shall remain in force.' And, as there is no act of the legislature of Louisiana repealing this law and accepting the provisions of the treaty, so as to secure to her citizens similar rights in France, this court might feel some difficulty in saying that it was repealed by this treaty, if the State court had not so expounded its own law, and held that Louisiana was one of the States in which the proposed arrangements of the treaty were to be carried into effect."

As to the treaty-making power with reference to the taxing power of Congress, see *infra*, § 500.

In a later case,[1] the court construed the treaty with Wurtemburg and held that it had no application to the property of a naturalized citizen of the United States dying in Louisiana. It said, page 448: "It has been suggested in the argument of this case, that the government of the United States is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners, in reference to property within the States. The question is one of great magnitude, but it is not important in the decision of this cause, and we consequently abstain from entering upon its consideration."

[1] Frederickson *v.* Louisiana, 23 How. 445.

§ 37. Tax evasion through investments in U. S. securities.

The exemption of United States bonds and notes from taxation (now repealed as to notes) afforded opportunities for tax evasion, which however found no favor with the courts. Thus where a citizen of Kansas withdrew his money from bank on the day before the annual date for listing for taxation, converted this money into United States notes and deposited them as a special deposit, the court[1] affirmed a judgment of the Circuit Court of Kansas dismissing the bill in equity to restrain the collection of the tax. It said that a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation, and that his remedy, if he had any, was in a court of law.

But a party who sued at law to recover the amount of taxes imposed upon him under somewhat similar circumstances met with the same fate.[2] In his case the court held that the statute of Ohio did not tax the citizens for the greenbacks or other government securities which they might have held at any time during the year, but taxed upon the money, credits or other capital which they had or used according to the monthly average of the preceding year, and that this was not in conflict with the laws of the United States exempting United States notes, the court adding, l. c., page 599: —

"It needs no other evidence that the rule adopted by the State of Ohio is the better one than the case before us, by which a possessor of large means, subject to taxation during every day in the year but one, may escape the payment of any tax upon all his property, if the trick resorted to in the present case be successful."

[1] Mitchell *v.* Board of Commissioners, 91 U. S. 206.

[2] Shotwell *v.* Moore, 129 U. S. 590.

Justice Bradley however dissented, saying that he did not wish to aid the plaintiff, but it was a question of law, and the law of Ohio seemed to him repugnant to the Act of Congress.

§ 38. Payment of State taxes in coin sustained.

Congress during the Civil War authorized the issue of the so-called "legal tender" treasury notes, and made them legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest on bonds and notes of the United States. The State of Oregon required the payment of the State and school taxes in gold and silver coin. The Supreme Court held[1] that this act was valid, and affirmed the judgment of the Supreme Court of Oregon for the payment in coin of the taxes for the year 1863, coin being then at a premium, although tender of payment had been made in United States notes, which were then depreciated. It said that the State had the power to control the payment of its own taxes, and that there was nothing in the Constitution which contemplated or authorized any abridgment of this power by national legislation. The Act of Congress making the United States notes legal tender for debts had no reference to taxes imposed by State authority.

[1] Lane County *v.* Oregon, 7 Wall. 75.

CHAPTER II.

CONTRACTS OF EXEMPTION FROM TAXATION.

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§ 39. Legislative grants held to be contracts.

The Constitution of the United States provides, Article I., Sec. 10: "No State shall pass any law impairing the obligation of contracts." The application of this provision to legislative grants of exemption from taxation is firmly established by the decisions of the Supreme Court, though from the beginning there has been a series of dissents, and the doctrine of the earlier decisions has been in some respects materially modified in later years.

The foundation of the doctrine was laid in one of the notable opinions of Chief Justice Marshall, Fletcher v. Peck, in 1810,[1] wherein it was held that this provision of the Constitution extends to contracts to which the State is a party,

[1] 6 Cranch, 87.

that is, to legislative grants. The court said that while one legislature is competent to repeal any act of general legislation which a former legislature was competent to pass, yet if an act is done under a law, a succeeding legislature cannot undo it. "It will be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected."

§ 40. **Grant of exemption held a contract.**

Soon after, the same principle was applied by the court [1] to the act of the legislature of New Jersey enacted in 1758, providing that lands purchased from the Delaware Indians, and set apart for their use, in consideration of a release by them of other lands, should not thereafter be subject to any taxation, any law or usage or custom to the contrary notwithstanding, and further restraining the Indians from making any lease or sale. Subsequently, the legislature, having, at the petition of the Indians, authorized a sale by an act making no reference to the exemption from taxation, the land in 1803 was sold. After the sale the legislature, in 1804, passed an act repealing the exemption from taxation. It was held by the court in an opinion by Chief Justice Marshall, reversing the New Jersey court, that this was a valid contract protected by the Constitution, and that the privilege, though for the benefit of the Indians, was annexed by the terms of the act to the land and not to the persons.[2]

[1] New Jersey *v.* Wilson, 7 Cranch, 164.

[2] Certain of the lands held exempt in this case had been leased out under an act of 1796, which was not brought to the attention of the court in the Wilson case, and subsequently for about sixty years taxes were regularly assessed upon these lands and paid. It was held by the Supreme Court in Given *v.* Wright, 117 U. S. 648, that this probably would not have affected that decision, which had, at all events, been referred to and relied on in so many cases from the date of its rendition that it would cause a shock to our jurisprudence to disturb it, and added

§ 41. Contracts of exemption not implied.

After the decision in the Dartmouth College case, that the clause of the Constitution under consideration applied to corporate charters, the claim was made that an act of the Rhode Island legislature imposing a tax on every bank in the State except the Bank of the United States, on the capital stock actually paid in, impaired the obligation of the contract created by the charter granted by Rhode Island to Providence Bank. The court held, in an opinion by Chief Justice Marshall, that as the charter contained no stipulation promising exemption from taxation, the State had made no express contract, and hence no contractual obligation had been impaired.

It was argued that the power to tax involved the power to destroy all the profits of the franchise, and therefore was inconsistent with the grant. But the court replied that the relinquishment of the power of taxation was never to be presumed, and that the argument logically pursued would apply with equal force to every incorporated company and even to the taxation of land. The principle applied in McCulloch *v.* Maryland and Osborn *v.* Bank of the United States had no application. The exemption there was founded expressly on the supremacy of the laws of Congress, and the necessary consequence of that supremacy was to exempt its instrument employed in the execution of its powers from the operation of any interfering power whatever. The vital power of taxation may

at p. 655: "If the question were a new one we might regard the reasoning of the New Jersey judges as entitled to a great deal of weight, especially since the emphatic declarations made by this court in Providence Bank *v.* Billings, 4 Peters, 514, and other cases, as to the necessity of having the clearest legislative expression in order to impair the taxing power of the State." But apart from that, the court held that long acquiescence under the imposition of the taxes raised the presumption that the exemption which had once existed had been surrendered.

be abused, but the Constitution of the United States was not intended to furnish the correction of every abuse of power which may be committed by the State governments. "The interest, wisdom and justice of the representative body and its relations with its constituents furnish the only security where there is no express contract against unjust and excessive taxation as well as against unwise legislation generally."[1]

§ 42. The validity of tax exemption contracts established.

In 1845, in the case of Gordon *v.* Appeals Tax Court,[2] the principle that contracts to which the State is a party, are protected by the Federal Constitution from impairment of their obligation, was enforced for the first time by the Supreme Court in case of exemption from taxation in a corporate charter. An act of Maryland continuing a bank charter, upon condition that the corporation should pay certain sums for public purposes, and declaring that upon its accepting and complying with the provisions of the act, the faith of the State was pledged not to impose any further tax or burden upon the corporation during the con-

[1] Providence Bank *v.* Billings, 4 Pet. 514. Justice McLean, in delivering the opinion of the court in Piqua Branch Bank *v.* Knoop, 16 Howard, 387, says: "In the argument the case of Providence Bank *v.* Billings, 4 Peters, 561 (decided in 1830), was referred to. This reference impresses me with the shortness and uncertainty of human life. Of all the judges on this bench when that decision was given I am the only survivor. From several circumstances the principles of that case were strongly impressed upon my memory, and I was surprised when it was cited in support of the doctrines maintained in the case before us. The principle held in that case was, that where there was no exemption from taxation in the charter, the bank might be taxed. This was the unanimous opinion of the judges, but no one of them doubted that the legislature had the power, in the charter or otherwise, from motives of public policy, to exempt the bank from taxation, or by compact to impose a specific tax upon it." See also Memphis Gas Co. *v.* Shelby Co., 109 U. S. 398, holding that exemption from license taxation could not be inferred.

[2] 3 Howard, 133.

tinuance of the charter, was held to exempt, not only the franchise, but the stockholders from a tax levied upon them as individuals. It has been held in later cases that this decision turned upon the construction of the act of Maryland above mentioned, exempting the bank from taxation on account of a large bonus to the State, and that the stockholders upon a true construction of the act were within the terms of the exemption.[1]

§ 43. Application to consolidated corporation.

Later decisions of the court applied the principle to the case of a consolidated corporation made up of constituent roads, one of which had a chartered exemption from taxation. It was held[2] that the exemption must be strictly construed, that the taxing power is never presumed to have been relinquished unless the intention to relinquish is declared in clear and unambiguous terms, and that such of the property of the consolidated company as was subject to taxation before, continued to be so subject, notwithstanding the claim to exemption of part of it, which could only apply to that part.

§ 44. Ohio bank tax cases.

In a series of decisions the court enforced the limitation, contained in its charter, upon the liability to taxation of the State Bank of Ohio.[3] The charter provision was held in these cases to be in lieu of all taxes to which the company or stockholders would be otherwise subject. In Jefferson

[1] This case has been criticised and distinguished on the proposition that exemption may be implied from the payment of a consideration for the franchise. See New Orleans &c. Co. *v.* New Orleans, 143 U. S. 192 and 195; also upon the extension of an exemption of corporate property and franchises to corporate stockholders, see Shelby County *v.* Union Bank, 161 U. S. 149 and 157; see also dissenting opinion of Justice Catron in Piqua Branch *v.* Knoop, 16 Howard, 401.

[2] Philadelphia & Wilmington R. Co. *v.* Maryland, 10 Howard, 376.

[3] Piqua Branch *v.* Knoop, 16 Howard, 368, three judges, Catron, Daniel and Campbell dissenting; Ohio Life Ins. & Trust Co. *v.* Debolt, 16 How. 416; Dodge *v.* Woolsey, 18 How. 331.

Branch Bank *v.* Skelly,[1] decided in 1861, the court reaffirmed this ruling, refusing to conform to the decision of the Supreme Court of Ohio, which, it seems, had changed its ruling upon the subject. But it said that its "appellate power would be of no use to a litigant if the court could not decide independently of all adjudication of the Supreme Court of the State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and its obligation should be enforced, notwithstanding a contrary conclusion of the Supreme Court of the State." And the court added: —

"We are aware that the very stringent rule of construction of this court in respect to taxation by a State has not been satisfactory to all persons. But it has been adhered to by this court in every attempt hitherto made to relax it; and we presume it will be, until the historical recollections, which induced the framers of the Constitution of the United States to inhibit the States from passing any law impairing the obligation of contracts, have been forgotten. This court's view of that clause of the Constitution, in its application to the States, is now, and ever has been, that the State legislatures, unless prohibited in terms by State constitutions, may contract by legislation to release the exercise of taxing a particular thing, corporation, or person, as that may appear in its act, and that the contrary has not been open to inquiry or argument in the Supreme Court of the United States."

§ 45. Missouri exemptions enforced against constitutional repeal.

The general subject of the inviolability of charter exemptions, particularly with reference to charitable and educational corporations, is very thoroughly discussed in the

[1] 1 Black, 436.

Home of the Friendless [1] and the Washington University [2] cases from Missouri, decided in 1869. Both of these corporations had been chartered by the State of Missouri, and their charters exempted their property from taxation. At that time there was no constitutional prohibition of such exemptions. Subsequently, however, the constitution of 1865 prohibited all exemptions from taxation. The Supreme Court of Missouri [3] held that the property was taxable, and said in the University case: —

"When the charter of the university was granted, the legislature might have considered it reasonable to foster and encourage it in its infancy and confer upon it privileges and immunities while struggling into existence. But no provision is made in express terms, or by reasonable intendment, that those immunities should be perpetual and have the effect of withdrawing millions of subsequently acquired property from taxation. In 1853 taxes were light and the State debt was small, and exemptions could be made without great detriment. After that period the State embarked into a false and ruinous system of loaning its credit to corporations, by which it incurred an immense debt; then followed the Civil War, which increased its already burdensome obligations, and taxation became exceedingly onerous.

"In this condition of things it was deemed the part of wisdom to make all property within the jurisdiction of the State, receiving the benefit of her laws and protection, contribute its proper proportion and share the common burdens. This was entirely a matter resting in the sound discretion of the legislative branch of the government, and we have been unable to find any objection to their exercise of the power."

[1] 8 Wallace, 430.

[2] 8 Wallace, 439. See remarks of court as to this case in Grand Lodge *v.* New Orleans, 166 U. S. 143.

[3] Washington University *v.* Rowse, 42 Mo. 308, l. c. p. 326.

§ 46. Opinion in Missouri cases.

Both cases were reversed by the Supreme Court (Chief Justice Chase and Justices Miller and Field dissenting). The court said, in Home of the Friendless *v.* Rowse, l. c. page 438: —

"The validity of this contract is questioned at the bar on the ground that the legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of this court, that a State may by contract based on a consideration exempt the property of an individual or corporation from taxation, either for a specified period or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration and binds the State if the charter containing it is accepted."

It was said further, that it was unnecessary that there should have been a consideration named in the act; it was sufficient if the legislature deemed the objects of the grant to be beneficial to the community.

To the argument made in the University case, that the exemption involved a dangerous power which might be abused by the university, the court replied, l. c. page 440: —

"It is urged that the corporation, as there is no limit to its right of acquisition, may acquire property beyond its legitimate wants, and in this way abuse the favor of the legislature, and in the end become dangerous, on account of its wealth and influence. It would seem that this apprehension was more imaginary than real, for the security against this course of action is to be found in the nature of the object for which the corporation was created. It was created specially to promote the endowment of a seminary of learning, and it is not to be presumed that it will ever act in such a manner as to jeopardize its corporate

rights; nor can there be any well-grounded fear that it will absorb, in its efforts to establish a literary institution of high order of merit, in the city of St. Louis, any more property than is necessary to accomplish that object. Should a state of case in the future arise showing that the corporation has pursued a different line of conduct, it will be time enough then to determine the rights of the parties to this contract, under this altered condition of things. The present record presents no such question, and we have no right to anticipate that it will ever occur. It is enough for the purpose of this suit to say, that so long as the corporation uses its property to support the educational establishments for which it was organized, it does not forfeit its right not to be taxed under the contract, which the State made with it."

§ 47. Dissent in Missouri cases.

Justice Miller in a strong dissenting opinion, in which Chief Justice Chase and Justice Field concurred, said, l. c. page 443: —

"We do not believe that any legislative body, sitting under a State constitution of the usual character has the right to sell, to give or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can

destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

* * * "With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened, in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defense of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned."

§ 48. **Northwestern University v. People and other cases.**

In University *v.* People of Illinois,[1] the court, in an opinion by Justice Miller, held that the statute of Illinois, as construed by the Supreme Court of the State, limiting the chartered exemptions of the Northwestern University to the lands and other property in the immediate use of the institution, was erroneous and that the exemption extended to the property, the annual profits whereof were devoted to the purposes of the institution.

In the case of St. Ann's Asylum in New Orleans, which was exempted from taxation as to all of its property, real and personal, it was held that the exemption extended to the devise of certain property, *i. e.*, a cotton press, the revenues whereof were applied to asylum purposes.[2] But in the case of Christ Church Hospital of Philadelphia,[3] it

[1] 99 U. S. 309.

[2] Asylum *v.* New Orleans, 105 U. S. 362.

[3] Rector &c. *v.* County of Philadelphia, 24 Howard, 300.

was held that there was no contract for perpetual exemption, but only a gratuitous concession on account of temporary conditions.

§ 49. Bank notes and coupons made receivable for taxes.

The charters of banks of some of the Southern States provided that their bills and notes should be receivable in payments of all taxes and other moneys due the States. It was held that such charters were contracts on the part of the States with all subsequent holders of the notes, as if attached to the notes when issued, and that the contract right to tender the notes in payment of taxes continued after the repeal of that section of the charter.[1] The court said: "The guaranty is in no sense a personal one. It attaches to the note, — is a part of it as much so as if written on the back of it, and goes with the note everywhere and invites every one who has taxes to pay to take it."

§ 50. Tennessee constitutional amendment held void.

In Tennessee, a constitutional amendment adopted in 1865 declared the issues of the Bank of Tennessee during the Civil War to be void, and forbade their receipt for taxes. But it was held[2] that this amendment was void, for there was only one State of Tennessee and its attempted secession was ineffective. The political body continued as a State in the Union and never escaped the obligations of the Constitution. The court in its opinion cites the periods of the Commonwealth in England and of the Revolution in France as showing that the acts of the government were upheld. It could not presume that the notes were issued to sup-

[1] Woodruff *v.* Trapnall (Arkansas), 10 How. 190; Furman *v.* Nichol, 8 Wallace, 44; State *v.* Stoll (S. C.), 17 Wallace, 425.

[2] Keith *v.* Clark, 97 U. S. 454.

port the rebellion because issued contemporaneously with it, and the tender of notes in payment of taxes was held good.[1]

§ 51. Mississippi notes in aid of Confederacy held void.

But where notes were issued by the legislature of Mississippi in aid of the Confederacy, in 1861, and made receivable in payment of taxes, they were void and not receivable in payment of taxes, which the reorganized State government directed should be paid in the currency of the United States.[2]

§ 52. Change in remedy not impairment of contract.

A State having contracted for the receipt of its bank notes in payment of taxes does not impair the obligation of a contract by enlarging, limiting or altering the modes of procedure for enforcing it, provided the remedy be not withheld or embarrassed with restrictions which seriously impair the value of the right. Thus a taxpayer in Tennessee, who was limited to an action at law against the tax collector to recover the amount of taxes paid in money under protest, was held to have an ample remedy.[3]

§ 53. The Virginia Coupon Cases.

The question of the enforcement of a State contract and the receipt of State obligations in payment of taxes, particularly with reference to the adequate remedies provided for the enforcement of such contract, was thoroughly considered in every possible phase by the Supreme Court in a series of cases known as the Virginia Coupon Cases, involv-

[1] Chief Justice Waite and Justices Bradley and Harlan dissenting.

[2] Taylor *v.* Thomas, 22 Wallace, 479.

[3] Tennessee *v.* Sneed, 96 U. S. 69, see *infra*, change in remedy; South Carolina *v.* Gailard, 101 U. S. 433.

ing litigation, which, in different forms, was before the court during a period of twenty years.

The State of Virginia in 1871, in adjusting its debt with its creditors on account of the separation of West Virginia during the Civil War, provided for funding two-thirds of its outstanding debt and accrued interest in bonds and coupons, the remaining one-third to be represented by certificates with a view to settlement with West Virginia. To facilitate the acceptance of this adjustment, it was provided that the coupons should be receivable at and after maturity for all taxes, debts, dues and demands due the State, and that this should be expressed on their face. The validity of this contract was at first sustained by the Court of Appeals of Virginia, which held invalid an act repealing the provision for the receipt of coupons for taxes. Thereafter however an act was passed providing that from the coupons when received for taxes there should be deducted a State tax equal to fifty cents on the one hundred dollars of the market value of the bonds, this act applying in terms to all bonds of the State, whether held by her own citizens or by non-residents and citizens of other States and countries. The court held[1] that the receivability of the coupons for taxes was clearly a contract obligation inuring to the benefit of all the holders of the bonds and coupons; that the coupons were distinct and independent contracts, and that the taxing act could not be applied to coupons separated from the bonds and held by different owners without impairing the contract with the bondholder and the bearers of the coupons, as contained in the funding act.

§ 54. Virginia Coupon Cases under Act of 1882.

In 1882, the State enacted a law providing that when a *mandamus* was sued out against the collector of taxes to

[1] Hartman *v.* Greenhow, 102 U. S. 672.

compel the receipt of coupons in payment, the taxpayer should be required to pay the taxes in money and file his coupons for the trial of the issue as to their genuineness. If the issue was found in their favor, the money paid was to be refunded out of the State treasury in preference to all other claims. The court, reaffirming its opinion as to the contract right to pay taxes in coupons, held that the remedy provided by this act was adequate and efficacious, and substantially equivalent to that which existed at the date when the coupons were issued.[1] It said, however, that the question whether the tax collector was not bound in law to receive the coupons when tendered, and whether, if he refused them and proceeded with the collection of the tax, he could not be made personally responsible in damages was not before them.

§ 55. The Supreme Court on the Eleventh Amendment of the U. S. Constitution.

This question did come later before the court in a series of cases, reported as the Virginia Coupon Cases.[2] The court reaffirmed its previous opinion, and held that the taxpayer was not compelled to seek the remedy provided by the act of 1882. He could tender his coupons, and such tender would be equivalent to payment so far as concerned the legality of all subsequent steps by the collector to enforce payment by distraint of his property. The coupons, made receivable for taxes, were not bills of credit within the prohibition of the Constitution, nor was the right of the taxpayer to sue the collecting officer for the recovery of property seized for taxes after he had made a lawful tender a suit against the State within the meaning of the Eleventh Amendment of the Constitution of

[1] Antoni *v.* Greenhow, 107 U. S. 769.
[2] 114 U. S. 269.

the United States. On this point (four judges dissenting) the court said that there was a distinction between the government of a State and the State itself; that, in contemplation of law, the State had not passed the acts violative of the Constitution of the United States, as they were void, and therefore the officer had no official sanction for his conduct and was guilty of a personal violation of the plaintiff's rights. It also sustained the remedy by injunction against the collection of the tax, in cases where there was no adequate remedy at law, but held that a coupon holder, who had not alleged that he was a taxpayer, was not entitled to any relief. No direct action moreover for the denial of rights secured by the contract would lie on the 16th clause of section 629 of the Revised Statutes of the United States, but the remedy must be a judicial determination between individuals as to the validity of the law, under cover of which the attempt to collect the tax had been made, and the consequent wrongful disturbance of property rights occasioned.

One having tendered coupons in payment of a license required for the practice of a profession could go on practicing his profession, and any law of the State subjecting him to criminal proceedings therefor was invalid. He was not obliged to sue out a *mandamus* to compel the acceptance of the coupons.[1]

§ 56. The later Virginia Coupon Cases.

Another series of coupon cases came up for decision in 1889,[2] and the court held void sundry acts of the Virginia legislature opposing impediments and obstructions to the use of the coupons, on the ground that these materially im-

[1] Royall *v.* Virginia, 116 U. S. 572, and Sands *v.* Edmunds, 116 U. S. 585. See also Willis *v.* Miller, 29 Fed. Rep. 238.

[2] 135 U. S. 662.

paired the obligation of the contract. Thus the provision which imposed upon the taxpayer the duty of presenting the bond, from which the coupons were cut, at the time of tendering them in payment, was an unreasonable condition. Another provision also was held invalid which prohibited expert testimony to establish the genuineness of the coupons. A special license fee of one thousand dollars required for the right to offer tax receivable coupons was adjudged a material interference with their negotiability. The court conceded that the rules affecting the remedy were subject at all times to modification and control by the legislature, even as to existing causes of action, but declared that no legislature had the power to establish rules which, under the pretense of regulating evidence, went so far, as to altogether preclude the party "from exhibiting his rights." It was held also that the coupons were lawfully tendered in payment of costs of suits, as well as in payment of taxes, and that the time-limit of one year for tendering coupons was, under the circumstances, unreasonable.

On the other hand, the requirement that the taxes for licenses to sell liquors and school taxes should be paid in lawful money, and not in coupons, did not impair the obligation of the contract. As to the liquor license this decision was put on the ground that there was involved the principle of regulation as well as taxation; and the act of 1871, as applied to the fund for maintaining schools, was contrary to the Virginia constitution of 1869.

The court remarks, concluding the opinions in this series of cases, at page 721: "It is certainly to be wished that some arrangement may be adopted which will be satisfactory to all parties concerned and relieve the courts as well as the Commonwealth of Virginia, whose name and history recall so many interesting associations, from all further exhibitions of a controversy that has become a vexation and a regret."

§ 57. The Supreme Court on Virginia court overruling previous opinion.

But this wish was not gratified, and the next step was a decision by the Court of Appeals of Virginia reversing its previous opinions, and dismissing the petition of the plaintiff, who tendered coupons in payment of his taxes, on the ground that the coupon provision of the act of 1871 was void.[1]

This case was brought by writ of error to the Supreme Court, where the judgment was reversed,[2] the court saying, in its opinion by Justice Brewer, l. c. page 106: —

"Perhaps no litigation has been more severely contested or has presented more intricate and troublesome questions than that which has arisen under the coupon legislation of Virginia."

The previous decision was reaffirmed. Under the circumstances, said the court, it seemed to them that it would be a clear evasion of the duty cast upon them by the Constitution of the United States to treat all this litigation and these prior decisions as mere nullity and consider the question as a matter *de novo*. It seemed that the act of 1882 for testing the genuineness of the coupons which had been adjudged an adequate and efficacious remedy in Antoni *v.* Greenhow had been repealed and it had not been determined by the Court of Appeals of Virginia whether the remedy of *mandamus* to enforce the receipt of coupons for taxes existed. The court said that if it should be finally held by that court that the remedy of *mandamus* did not exist, then it would be a question for further consideration whether the act repealing the act of 1882 could be sustained.

[1] McCullough *v.* Virginia, 90 Va. 597.

[2] McCullough *v.* Virginia, 172 U. S. 102.

§ 58. The Supreme Court determines for itself whether State legislation constitutes a contract.

It has been the uniform ruling of the Supreme Court that it determines for itself whether the State legislation in question constitutes a contract, and it is not bound by the decision of the State court holding that a particular charter or charter provision does not constitute a contract. This is an exception to the general rule that the Federal courts accept the construction placed by the courts of a State upon its statutes and constitution. Thus the court said, in McGahey *v.* Virginia,[1] l. c. page 667 : —

"In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of State courts, to inquire, and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the State courts in relation thereto."

Thus if a statute of a State creates a contract and it is alleged that a subsequent statute impairs the obligation of that contract, and the highest court in the State construes the first statute in such a manner that the second statute does not impair it, a judgment of the State court sustaining the validity of the second statute on account of its construction of the first statute will be subject to review on writ of error in the United States Supreme Court.[2]

[1] 133 U. S. 662.

[2] Bridge Proprietors *v.* Hoboken Co., 1 Wallace, 116.

§ 59. Illustrations of the independent judgment as to contract.

In the case of Mobile & Ohio Railroad Co. *v.* Tennessee,[1] the State Supreme Court held that the charter exemption from taxation relied on as a contract was in violation of the State constitution. Reversing this decision, the court held, p. 492: "The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a State, by its terms or necessary operation, gives effect to some provisions of the State law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation."

The constitution of Missouri of 1865 provided for a tax of ten per cent upon the gross earnings of certain railroad corporations. As to one company it was held that this tax was an impairment of the obligation of a contract,[2] but in the case of another company the tax was sustained because the court found that the contract of exemption had expired by its own limitation.[3]

§ 60. Contract must be properly brought before the court.

The Supreme Court will, however, decide this question of the existence and impairment of a contract, only when the judgment of the State court is brought before it for review. If the decision of the State Supreme Court is in favor of the right or immunity claimed under the United

[1] 153 U. S. 486.
[2] Pacific Railroad Co. *v.* Maguire, 20 Wallace, 36.
[3] North Missouri R. R. Co. *v.* Maguire, 20 Wallace, 46.

States Constitution, it is final. The same question however may be brought before the Supreme Court from one of the United States Circuit Courts in the exercise of its appellate jurisdiction. In such case the court exercises its independent judgment, and may determine that there was no contract of exemption from taxation, notwithstanding a prior judgment of the State court to the contrary. Thus in a case from Tennessee on appeal from the United States Circuit Court,[1] the prior judgment of the State Supreme Court, sustaining the claim of exemption was urged, but the court said, l. c. page 151: —

"In such a case as this where we are to construe the meaning of the clause of the statute as to what contract is contained therein, and whether the State has passed any law impairing its obligation, we are not bound by the previous decisions of the State courts, except when they have been so long and so firmly established as to constitute a rule of property (which is not the case here), and we decide for ourselves independently of the decisions of the State courts, whether there is a contract and whether its obligations are impaired."

§ 61. When State court not followed.

In a recent Kentucky case however the State court overruled its decision that the act constituted a contract in the case of another party, so that the question came before the Supreme Court.[2] It was urged upon that tribunal that it should follow the first decision of the

[1] Shelby County *v.* Union &c. Bank, 161 U. S. 149. See also Bank of Commerce *v.* Tennessee, 161 U. S. 134, 144; also L. & N. R. R. Co. *v.* Palmes, 109 U. S. 245.

[2] Citizens' Savings Bank *v.* Owensboro, 173 U. S. 636. See also Stone *v.* Bank of Commerce, 174 U. S. 412.

State court construing the State statute, but it said, pp. 647–8: —

"Undoubtedly in the Bank Tax cases, 97 Kentucky, 597, the Court of Appeals of Kentucky decided that the Hewitt law created an irrevocable contract, and that the general assembly of that State could not repeal, alter or amend it without impairing the obligation of the contract, despite the existence of the act of 1856, and despite the circumstances that that act was in express terms incorporated in and made part of the Hewitt law. But the reasoning by which the court reached this conclusion is directly in conflict with the settled line of decisions of this court just referred to, and the case has been specifically overruled by the opinion announced by the Kentucky Court of Appeals in the case now under review. It is not and cannot be asserted that the Bank Tax cases were decided before the contract evidenced by the Hewitt law was accepted, hence it cannot be urged that such decision entered into the consideration of the parties in forming the contract. It is not pretended that the bank, whose rights are here contested, was either a party or privy to the Bank Tax cases. And even if such were the case, we must not be understood as intimating that the construction of the Hewitt Act, which was announced in the Bank Tax cases, would be binding in controversies as to other taxes between those who were parties or privies to those cases. On this subject we expressly abstain from now intimating an opinion. In determining whether, in any given case, a contract exists, protected from impairment by the Constitution of the United States, this court forms an independent judgment. As we conclude that the decision in the Bank Tax cases above cited, upon the question of contract, was not only in conflict with the settled adjudications of this court, but also inconsistent with sound principle, we will not adopt its conclusions."

As the court decides for itself whether a legislative act or charter constitutes a contract and will not be concluded by the decision of the State court, *a fortiori* it will not follow the State court when the latter reverses its previous judgment that the act constituted a contract.[1]

§ 62. **When concluded by decision of State court.**

The Supreme Court, however, adopts the ruling of the State court on points relating to the construction of the State constitution and statutes, other than as to the existence of a contract and the impairment of its obligation. Thus on the question whether a company was doing business in the State within the meaning of its statute, the court is concluded by the judgment of the State court. Thus in Erie Railroad Co. *v.* Pennsylvania,[2] it is said: —

"The Supreme Court of that State has held that this 'company was doing business in the State in the sense of that act.' This construction of a State statute by the Supreme Court of the State, involving no question under the laws or Constitution of the United States, is conclusive upon us. We accept the construction of State statutes by the State courts, although we may doubt the correctness of such construction. We accept and adopt it, although we may have already accepted and adopted a different construction of a similar statute of another State, in deference to the Supreme Court of that State."

Thus on the question whether the act done by or under the authority of the State impairs the obligation of a contract, the effect of the act must be determined in the light of the construction given by the State court. If that act as construed and enforced in the State court impairs contract rights, then the Federal court has jurisdiction, to

[1] Jefferson Branch Bank *v.* Skelly, *supra*.

[2] 21 Wallace, 492, 497.

determine, not the correctness of the construction, but whether the effect of the act as construed is to impair the contract right.

§ 63. When and to what extent State court is followed.

In a late case[1] the court said that although it is its duty to exercise an independent judgment as to the nature and extent of a contract when its jurisdiction is invoked because of the asserted impairment of contract rights from the effect given to subsequent legislation, nevertheless, when the contract alleged to have been impaired arises from a State statute, the Federal court, for the sake of harmony and to avoid confusion, will lean towards an agreement with the State court, if the question seems balanced with doubt. The constitutional question was held to be sufficiently raised by a public board, which the State court had held to have enough fiduciary capacity for that purpose, since this power of the State board was a matter of local law, on which the decision of the State court would be accepted.

§ 64. Limitation of independent judgment.

The "independent judgment" of the Supreme Court was materially limited under the decision in a recent case.[2] The charter of a Mississippi railroad granted in 1882 contained an exemption from taxation for twenty years. The State constitution then in force had been construed by the State Supreme Court as authorizing exemptions from taxation, but also making them *repealable*. It was held that this ruling of the Mississippi court that the constitution only authorized repealable exemptions involved a local and not a Federal question, and the Supreme Court therefore could not review the action of the State court in holding

[1] Board of Liquidation *v.* Louisiana, 179 U. S. 622.
[2] Gulf & Ship Island R. R. Co. *v.* Hewes, 183 U. S. 66.

the exemption to have been repealed by a subsequent statute; and, further, that this ruling applied both to privilege taxes and property taxes, since both were repealable exemptions.

§ 65. Contract only impaired by law.

Limits are also set to the independent judgment of the Supreme Court in deciding a case of alleged impairment of contract, by the jurisdiction of the State court to determine the construction of the subsequent act by which the contract is claimed to have been impaired. A contract can only be impaired under this provision of the Constitution by a *law;* that is, a law subsequently enacted. In the language of the Supreme Court: —

"The State court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which in our opinion is valid; it may adjudge a contract to be valid which in our opinion is void; or its interpretation of the contract may, in our opinion, be radically wrong; but in neither of these cases would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by State legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment in terms or by its necessary operation gives effect to some provision of the State constitution, or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question." [1]

§ 66. Impaired by municipal ordinance having force of law.

But the term "law" includes not only a provision of the State constitution or State statute, but also a municipal ordi-

[1] Lehigh Water Co. v. Easton, 121 U. S. 388, 392.

nance having the force of law. Thus a tax levied by a municipality under its chartered power, is a law in this sense.[1] But whether the ordinance of a municipality has the force of law so as to constitute an impairment of the contract, is a question involving the construction of local law, whereon the Supreme Court will follow the ruling of the State court.[2]

§ 67. What constitutes a contract of exemption.

A legislative grant may constitute a contract, if the contract is clearly expressed in it, and the right of contract may be based, not only upon what is actually contained in the act itself, but also upon what by reference is made part of it.[3] The exemption, however, must be clearly stated, and cannot be established by implication.[4]

The grant of all the powers, rights and privileges granted by the charter of another corporation carries with it an exemption from taxation included in such charter. The court said, l. c. page 247: "A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage, of a special exemption from a burden falling upon others." [5]

§ 68. Railroad franchise is property.

The exemption of the *property* of a railroad company and the shares thereof "from any public charge or tax whatsoever," has been held to include the exemption of the

[1] Murray *v.* Charleston, 96 U. S. 432, 440.

[2] New Orleans Water Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18.

[3] Humphrey *v.* Pegues, 16 Wallace, 244.

[4] Memphis Gas Co. *v.* Shelby Co., 109 U. S. 398, and cases cited.

[5] But see later case of Phoenix Ins. Co. *v.* Tennessee, 161 U. S. 174, to effect that there must be other language than the word "privilege," or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted. *Infra*, p. 87.

franchise from taxation, the court saying, l. c. page 267:[1]—

"Property is a word of large import, and in its application to this company included all the real and personal estate required by it for the successful prosecution of its business. * * * Nothing is better settled than that the franchise of a private corporation — which in its application to a railroad is the privilege of running it and taking fare and freight — is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed and depot grounds, but it is equally with them covered by the general term 'the property of the company,' and therefore equally within the protection of the charter."

§ 69. Conditional exemptions from taxation.

The power to make exemption from taxation includes the power to make it subject to conditions, or to limit to some specific form of taxation. Thus a railroad company may by grant of the legislature be entitled to the taxation of its property, land included, upon the basis of a per cent upon the gross earnings, and this right will be impaired by an act withdrawing the lands from this arrangement and subjecting them to taxation according to their cash value.[2] The exception may be limited to a term of years, or conditioned upon the completion of a railroad wholly or in part.

[1] Wilmington R. R. Co. *v.* Reid, 13 Wallace, 264. This case was distinguished in Wilmington Railroad Co. *v.* Alsbrook, 146 U. S. 301, holding that this exemption did not cover a branch line constructed by another company under a different charter.

[2] Stearns *v.* Minnesota, 179 U. S. 223, reversing 72 Minn. 200; Duluth and Iron Range R. R. Co. *v.* Minnesota, 179 U. S. 302, reversing 77 Minn. 433.

§ 70. Contract not to reduce dividend by taxation below fixed per cent sustained.

In a Tennessee case the road with its fixtures, including workshops, warehouses and vehicles of transportation was exempted from taxation for a period of years, and it was further provided that no tax should ever be laid on said railroad or its fixtures which would reduce its dividend to below eight per cent.[1] The court held that this exemption thus limited was valid; that the word "dividend" had reference to dividends on the capital stock of the company held and owned by its shareholders, and that the term profits out of which alone dividends can be declared denoted what remained after defraying every expense, including loans falling due as well as the interest on such loans.

It was claimed that the exemption clause had no operation if the company earned no money for a dividend, because in that event the dividends could not be reduced. But the court said that this theory was wholly wanting in plausibility, as, according to it, the company would be taxable when it made no profits, and only get the benefit of the exemption when profits of a certain amount were realized. In answer to the objection that the company could so keep its accounts or water its stock that it would never earn any dividends of eight per cent, the court said, p. 506 (four judges dissenting): —

"In dealing with an exemption from taxation, like that under consideration, good faith is required on the part of both parties to the contract. While the State may not impair or restrict its operation, neither may the railroad company enlarge it at will and without limitation. It is not shown that the railroad company has made any improper or fictitious increase, either of its capital stock or of its

[1] Mobile & Ohio R. R. Co. *v.* Tennessee, 153 U. S. 486.

bonded indebtedness. On the contrary, the proof establishes that the par value of the 53,206 shares of capital stock outstanding was realized therefor, dollar for dollar, and this amount of capital stock, together with the bonded indebtedness of the company, represents the *cost* of constructing and equipping the railroad. The legislature, in granting the exemption in question, doubtless had in contemplation the cost of the enterprise, and may have intended the immunity from taxation to be estimated on that basis, as in the Mississippi charter.

But however this may be, in sustaining the validity of the exemption in the present case we do not mean to be understood as holding that the railroad company has the right in its discretion, hereafter, to issue additional capital stock, or to increase its bonded indebtedness, even for legitimate purposes, and have the same taken into consideration upon the question of its liability for taxation under the eight per cent dividend clause of the charter."

§ 71. Tax on foreign held securities.

In another class of cases, the right of protection against taxation as an impairment of a contract has been sustained as *necessarily implied* in the contract, though not expressly stated. This includes the levy of a tax by a State or municipality upon foreign held securities.

The question was presented in the case of the Foreign Held Bonds,[1] where it was held that the law of Pennsylvania requiring the treasurer of a railroad company incorporated and doing business within the State, to retain five per cent of the interest due on bonds of the road payable out of the State to non-residents of the State and held by them, was

[1] 15 Wallace, 300; this case has been questioned on another point, *i. e.*, as to the *situs* of a mortgage for taxation, see Savings Society *v.* Multnomah County, 169 U. S. 421.

a law interfering between the company and the bondholder, and, under the pretense of levying a tax, impairing the obligation of the contract between the parties. The court said that the bonds issued by the railroad company were undoubtedly property, but property in the hands of the holders, not property of the obligors, and that so far as they were held by non-residents of the State they were property beyond the jurisdiction of the State. It said further that the obligation of a contract depends upon its terms and the means which the law in existence at the time it was made affords for its enforcement. A law, which alters the terms of a contract, by imposing new conditions or dispensing with those expressed, impairs its obligation, for as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract and it prevents their legal enforcement.[1]

§ 72. Taxation by State or municipality of its own securities.

The same principle was applied in the case of an attempted taxation by a municipality of its own securities held by non-residents.[2] Such a tax was levied by the city of Charleston, and it was provided by the ordinance that the treasurer should retain this tax out of the interest payable to the security holders. But, as to a non-resident holder, the tax was void.[3] It was said at page 445: —

"The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary

[1] Murray *v.* Charleston, 96 U. S. 432. This case was distinguished in People *v.* Commissioners, 76 N. Y. 77, holding bonds issued by the city of New York in the hands of residents of the State not exempt.

[2] Murray *v.* Charleston, *supra*.

[3] See *infra*, Chapter XIV, "Situs of Property for Taxation."

individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

The court in this opinion says that it was referred to decisions in Ohio and California,[1] in which the power of the State to tax its own bonds was sustained. But they were not in point on the question at issue, which was the right of a municipality to tax its own securities held by non-residents, by withholding the amount of the tax from the interest; and even if they were in conflict with the decision of the case at bar, they would not control the judgment of the court, on the meaning and extent of the Federal Constitution. The opinion was confined to holding that no municipality can by its ordinances, under the guise of taxation, relieve itself from performing to the letter all that it expressly promises to its creditors. The court said that it did not care to enter upon the consideration of the question whether a State can tax a debt due by one of its own citizens or municipalities to a non-resident creditor, or whether it has any jurisdiction over such a creditor, or over the credit he owns.[2]

In a later case this question was again considered by the court,[3] in one of the Virginia coupon cases, *supra*. It held that the act of Virginia requiring the tax on the bonds to be deducted from the coupons when tendered in payment of taxes could not be applied to coupons separated from

[1] Champaign County Bank *v.* Smith, 7 Ohio St. 42; People *v.* Home Ins. Co., 29 Cal. 533.

[2] Justice Miller and Justice Hunt dissented.

[3] Hartman *v.* Greenhow, 102 U. S. 672.

the bonds and held by different owners, without impairing the contract made in the funding act, see *supra*, § 53. The court remarked further, at page 683: —

"The power of the State to impose a tax upon her own obligations is a subject upon which there has been a difference of opinion among jurists and statesmen. On the one hand, it has been contended that such a tax is in conflict with and contrary to the obligation assumed; that the obligation to pay a certain sum is inconsistent with a right, at the same time, to retain a portion of it in the shape of a tax, and that to impose such a tax is, therefore, to violate a promise of the government." It cited Hamilton on Public Credit, 3d vol., pp. 514–518,[1] and added that "on the other hand it is urged that the bonds of every State are property in the hands of its creditors and as such they should bear their due proportion of the public burdens." But this question was not necessarily involved in the disposition of the case. The court continued, "whatever may be the wise rule — looking at the necessity of a commercial country for its prosperity, that its public credit should never be impaired, as to the taxability of the public securities, it is settled that any tax levied upon them cannot be withheld from the interest payable thereon."

This principle was applied in the United States Circuit Court of Louisiana,[2] where an injunction was granted restraining the assessment and collection of taxes upon judgments held by non-residents against the city of New Orleans, that is, an attempt by the city to collect taxes upon judgments against itself. The bonds on which the judgments had been recovered were specially exempted from taxation by the city charter, and the court held that

[1] See Murray *v.* Charleston, 96 U. S. 432, *supra*, and Foreign Held Bonds Case, 15 Wall. 300, *supra*, p. 71. .

[2] De Vignier *v.* New Orleans, 16 Fed. Rep. 11.

the judgments were entitled to the same exemption, and that, independently of this, in the absence of any provisions in the contract giving the right to impose a tax, it could not be imposed upon non-residents without impairing the obligation itself.

§ 73. Contract right to tax as a remedy.

The contract clause of the Constitution has been applied to another class of cases, where parties have been adjudged entitled to a levy of taxes in the enforcement of claims against municipalities. Here was involved the same principle which was enforced in the Virginia coupon cases, as the principle applied in both classes of cases is the familiar rule that the remedy for the enforcement of the contract existing when it is made enters into it, and cannot be destroyed or prejudicially affected, without impairing its obligation.[1] Thus when a municipality is authorized to incur debts and issue bonds, the power of taxation then existing is part of the contract within the meaning of the Constitution, and a subsequent statute which repeals or restricts the power of taxation is an impairment of such contract.

The leading case on this subject is Von Hoffman *v.* Quincy,[2] where the statute of Illinois at the time the bonds were issued authorized the levying of a sufficient special tax to pay the coupons as they fell due, and this law was subsequently repealed, so that the only tax allowed to be levied was insufficient to meet the debt and current expenses of the city. The court said that the power of taxation thus given was a contract within the meaning of the Constitution and could not be withdrawn until the contract was satisfied, and that it was the duty of the city to impose and collect the taxes in all respects as if the second statute

[1] Bronson *v.* Kinzie, 1 How. 311.
[2] 4 Wallace, 535.

had not been passed, and this duty would be enforced by mandamus. This ruling has been followed in numerous cases involving the enforcement of taxation for the payment of municipal bonds.[1]

In the case last cited it was argued that the power of taxation belongs exclusively to the legislative department of the government, that the extent to which it may be delegated to municipal bodies is a matter of discretion, and that in general the power may be revoked at the pleasure of the legislature. But the court said that legislation revoking the power of taxation was subject to the qualification that attends all State legislation, that it shall not conflict with the prohibitions of the Constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. It was urged in Louisiana *v.* Pilsbury that the people of New Orleans had been impoverished by the abolition of slavery and disabled from performing the contract according to its terms. The court said that the obligation of the city to perform its contract was no more lessened by the fact that there were no longer slaves to be taxed than it would be by the destruction of any other portion of the taxable property, although the taxation on what was left might be thereby increased.

Thus a statute of Missouri providing that no tax other than for current expenditures and schools and interest on the State bonds should be levied without an order of the Circuit Court, was void as to bonds issued prior to its enactment.[2]

[1] Wolff *v.* New Orleans, 103 U. S. 358; Louisiana *v.* Pilsbury, 105 U. S. 278.

[2] United States *v.* Lincoln County, 5 Dillon, 184; United States *v.* Johnson County, 5 Dillon, 207; Ralls County Court *v.* United States, 105 U. S. 733; see author's "Taxation in Missouri," pp. 71 to 81, as to conflict between State and Federal courts on this question in State of Missouri.

§ 74. Remedy may be changed, if substantial right not impaired.

The principle repeatedly enforced by the court has been declared in these words (122 U. S., p. 294): —

"It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void."[1]

But where the charter of the city was repealed and the State had taken control and custody of her public property and assumed the collection of the taxes previously levied, the Supreme Court held that the taxes levied before the repeal of the charter that were not paid could not be collected through the instrumentality of a court of chancery at the instance of creditors of the city. Such taxes could only be collected under authority of the legislature.[2]

§ 75. Contractual and governmental legislation distinguished.

While the State may by legislative act exempt from taxation, if not prohibited by the State constitution, such exemption can only be effected by contractual, as distinguished from governmental, legislation.

[1] Seibert *v.* Lewis, 122 U. S. 284; Louisiana *v.* New Orleans, 102 U. S. 203; Von Hoffman *v.* Quincy, 4 Wall. 535; Morgan *v.* Town Clerk, 7 Wall. 610; Morgan *v.* Beloit, 7 Wall. 613; Stuart *v.* Jefferson Police Jury, 116 U. S. 135.

[2] Meriwether *v.* Garrett, 102 U. S. 472, Justices Strong, Swayne and Harlan dissenting.

Thus a statute of a State taxing inheritances does not impair any contract rights of inheritance, even if such an act could be construed as a change in the law of succession, rather than as a fiscal imposition, and could not be held to violate the Constitution of the United States.[1] Neither does the enactment of an inheritance tax law constitute a contract between the State and the person living at the time of its enactment that if he shall die while the law is in full operation and unchanged, he may dispose of his estate without the imposition of any further tax upon any rights or interests acquired under his will than the tax imposed by law.[2]

§ 76. Municipal charter powers not contractual.

An act of New Jersey, providing that certain property of New Brunswick, used for charitable purposes, should be subject to taxation by the township in which it was located, was an exercise of governmental power and subject to repeal.[3] It did not create a contract between the State and the township. The conferring such rights of taxation is the exercise by the legislature of a public and governmental power; it is the imparting to the township of a portion of the power belonging to the State, which it can lawfully impart to a subordinate municipal corporation. But from the very character of the power it cannot be imparted in perpetuity, and is always subject to revocation, modification and control by the legislative authority of the State.

§ 77. State exemption of municipal property not contractual.

An act of Kentucky exempted from State, county and city taxation the water works of the city of Covington.

[1] Carpenter *v.* Pennsylvania, 17 How. 456; Orr *v.* Gilman, 183 U. S. 278.
[2] In re Vanderbilt, 50 N. Y. App. Div. 246.
[3] Williams *v.* New Jersey, 130 U. S. 189.

The Kentucky Court of Appeals held that the water works were the proprietary property of the citizens as distinguished from the property held for public or governmental purposes, and were therefore subject to taxation under the new constitution, notwithstanding the exemption of all public property used for public purposes. The Supreme Court [1] accepted this construction of the Kentucky statute, though it doubted the soundness of the ruling that the water works were not held for governmental purposes. But it agreed with the Kentucky court that the exemption from taxation by the terms of the act, was not irrepealable; and said further that, if the property was held in a governmental not a proprietary sense, the power of the legislature as to such property was still supreme, and that the charter of a municipal corporation is in no sense a contract between the State and the corporation.

§ 78. State control of proceeds of municipal taxation.

The distinction between the relation of the State to municipal corporations and to individuals was illustrated in a decision of the Supreme Court,[2] holding that a State, unless restrained by the provisions of its constitution, can direct a restitution to the taxpayers of a county or other municipal corporation of property exacted from them by taxation, in whatever form the property may be changed, so long as it remains in the possession of the municipality. The county in that case had, under legislative authority, subscribed to stock in a railroad company to be paid by a special tax levied for that purpose. The legislature enacted a law providing that the railroad company should issue to the taxpayers certificates for the taxes paid, which were made assignable, and it was

[1] Covington *v.* Kentucky, 173 U. S. 231.
[2] Board of Commissioners *v.* Lucas, 93 U. S. 108.

made the duty of the company to issue certificates of paid-up capital stock to the amount of the certificates of taxes paid when surrendered. The stock unclaimed was issued to the common school fund. The act declared that the issuing of the stock to the individuals or townships should cancel *pro tanto* the stock held by the county. The county claimed that the act impaired the obligation between it and the railroad, but the Supreme Court held that it was within the constitutional power of the State, although the invalidity of the act would not be a matter of serious doubt between the State and private individuals.

§ 79. Retrospective legislation and vested rights.

This principle of distinguishing between governmental and contractual legislation has been applied in numerous cases. Thus it has been held that the holders of tax certificates have no vested rights impaired by requiring them to give written notice to the occupant of the land of application for tax deeds. The court said: [1]—

"That a statute is not void because it is retrospective has been repeatedly held by this court, and the feature of the act of 1867, which makes it applicable to certificates already issued for tax sales, does not of itself conflict with the Constitution of the United States. Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by State and national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made and enhance the cost and difficulty of performance, or diminish the value of such performance by the other party, there is

[1] Curtis *v.* Whitney, 13 Wallace, 68; see Coulter *v.* Stafford, 6 C. C. A. 18; also Essex Public Road Board *v.* Skinkle, 140 U. S. 334.

no restraint in the Federal Constitution, so long as the obligation of performance remains in full force."

This principle is further illustrated by a case from New York,[1] where a statute modified, in the taxpayers' favor, previous laws of limitation concerning lands sold for non-payment of taxes. The statute had theretofore provided that any person might, at the sale for taxes, on advancing the amount of the unpaid taxes, have a lease of the premises for a stated number of years. This was amended by providing that, where the sale for taxes had been made more than eight years prior to the passage of the act no action should be maintained to compel the delivery of a lease unless commenced within six months after the date of passage. This was claimed to be an impairment of a contract right, but the Supreme Court held that there was nothing in the Constitution of the United States which prevented the legislature of New York from prescribing the limitation for bringing suits where none had previously existed, or from shortening the time within which suits should be commenced to enforce existing rights under tax sales, provided the time prescribed by the new law was a reasonable one.

§ 80. Justice Miller on legislative contracts.

In another case where the court found a contract in a railroad charter, it was said,[2] opinion by Justice Miller, l. c. p. 113:—

"It may safely be said that in far the larger number of

[1] Wheeler *v.* Jackson, 137 U. S. 245.

[2] New Jersey *v.* Yard, 95 U. S. 104; State ex rel. Schurz *v.* Cook, 148 U. S. 397; Marx *v.* Hanthorn, 30 Fed. Rep. 579. In this last case, held that while the legislature may make recitals of regularity of prior proceedings in tax deeds *prima facie* evidence, it cannot make them conclusive evidence of those proceedings which are essential to the validity of the transaction, without impairing the obligation of the contract with the purchaser of the property; but *aliter* as to non-essentials or matters of

cases brought to this court under that clause of the Constitution, the question has been as to the existence and nature of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts, — contracts found in statute laws of the State, if they existed at all. It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State within the protection of the clause referred to of the Federal Constitution."

After saying that it is always difficult to determine when a statute constitutes a contract, the court said: —

"This has always been a very nice point; and, when the supposed contract exists only in the form of a general statute, doubts still recur, after all our decisions on that class of questions." * * *

"Statutes fixing the taxes to be levied on corporations, partake, in a striking manner, of this dual character, and require for their construction a critical examination of their terms, and of the circumstances under which they are created.

"The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the rights of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit. But, so long as the majority of this court adhere to

routine. Sioux City R. R. Co. *v.* Sioux City, 138 U. S. 98; Garrison *v.* City of New York, 21 Wall. 196; Armstrong *v.* Athens County, 16 Peters, 281; Covington *v.* Kentucky, 173 U. S. 231; State *v.* Weyerhauser, 72 Minn. 519, holding that a statute providing for the taxation of property previously unlawfully omitted from the assessment, or grossly undervalued, does not impair the obligation of a contract.

the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

§ 81. Tax exemption not implied from license.

A contract right of exemption cannot be implied from the grant of a ferry license,[1] nor from an exclusive street railway franchise,[2] nor from a license to practice law,[3] nor from a State license to an insurance company to do business in the State.[4]

§ 82. Bounties and privileges.

Legislative grants of bounties or privileges, involving no reciprocal contractual obligations on the part of the grantee, confer no contractual rights. Thus the bounty and tax exemption granted to salt manufacturers in Michigan was held repealable,[5] as was also the exemption granted to manufacturers in the District of Columbia.[6]

§ 83. Consideration for exemption essential.

If the law is a mere offer of a bounty, it may be withdrawn at any time, although the recipients may have incurred expense on the faith of the offer. Thus an act of Louisiana, in exempting the hall of a Grand Lodge from State and parish taxes, as long as it was occupied as a Grand Lodge, was a mere continuing gratuity which the State had a right to withdraw by the adoption of a Con-

[1] Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365.

[2] New Orleans Railroad Co. *v.* New Orleans, 143 U. S. 192; disapproving on this point Gordon *v.* Appeals Tax Court, *supra*.

[3] Baker *v.* Lexington (Ky.), 21 Ky. Law Rep. 809.

[4] Home Insurance Co. *v.* Augusta, 93 U. S. 116.

[5] Salt Co. *v.* East Saginaw, 13 Wallace, 373.

[6] Welch *v.* Cook, 97 U. S. 541.

stitution which in effect repealed the exemption.[1] The court said there was the same necessity for a consideration to make a contract of exemption as there would be if it were a contract between private parties.

§ 84. Judgment for torts not contract.

Judgments were recovered against the city of New Orleans for damages done to property by a mob, the statutes of the State making municipalities liable for such damages. The new constitution, thereafter adopted, so limited the taxing power of the city as to prevent the plaintiffs from collecting their judgments, the funds receivable having been exhausted by current expenses. The court held[2] that this right to reimbursement for damages caused by a mob, while a statutory right, was not founded upon any contract of the city and did not become a contract by being merged in a judgment, adding at page 288: —

"The term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence."

§ 85. Tax exemption repealed under general power reserved to amend or repeal.

After the decision in the Dartmouth College case, holding that corporate charters are contracts protected by the Constitution, the practice became general in the States of inserting in corporate charters, whether contained in

[1] Grand Lodge *v.* New Orleans, 166 U. S. 143. See also Rector of Christ Church *v.* Philadelphia, 24 Howard, 300; Tucker *v.* Ferguson, 22 Wallace, 527; West Winconsin R. R. Co. *v.* Supervisors, 93 U. S. 595; Newton *v.* Commissioners, 100 U. S. 548.

[2] Louisiana *v.* Mayor of New Orleans, 109 U. S. 285.

special acts or in general corporation laws, the reservation of the power to alter, amend or repeal. Where, in a charter granting an exemption from taxation, such reservation is made, whether it is contained in the act itself, or in any other act which by reference is made part of it, or in the State statute controlling the terms of the act, it preserves to the State the right of amending or repealing the tax exemption whenever the public interest as determined by the legislature requires.

Thus in a case from South Carolina, where the immunity from taxation was granted by an amendment of the original charter of the railroad, and at the same time a general law of the State was in existence providing that any charter subsequently granted, or any renewal, amendment or modification of a charter, should be subject to amendment, alteration or repeal by legislative authority, the court held[1] that the original incorporators and the subsequent stockholders took their interests with knowledge of the existence of this power and of the possibility of its exercise at any time, at the discretion of the legislature. The object of the reservations, just as is true of similar reservations in other charters, was to prevent a grant of corporate rights and privileges in any form which would preclude legislative interference with their exercise, if the public interest should at any time require such interference. The court added however as to the effect of this reserved power, at page 459: —

"Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the incorporators; it does

[1] Tomlinson *v.* Jessup, 15 Wall. 454.

not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

This ruling has been followed in a number of cases.[1]

§ 86. Tax exemptions strictly construed.

A contract for exemption from taxation must not only be founded upon a consideration, but it must be clearly stated and will not be inferred from facts which do not irresistibly point to the existence of a contract.[2] This principle has been applied in numerous cases. Thus the exemption of a railroad from taxation does not extend to the branches of the road constructed under a subsequent act.[3] The exemption of the property and effects of a railroad company does not extend to property other than that used in the business of the company, nor to the land of the company.[4] Where a bank was to pay an annual tax upon

[1] Louisville Water Co. *v.* Clark, 143 U. S. 1; Railroad Co. *v.* Maine, 90 U. S. 499; Hoge *v.* Railroad Co., 99 U. S. 348; New York, etc., Railroad Co. *v.* Bristol, 151 U. S. 556. In the last case the court repeated what had been said in previous cases, page 567: That a power reserved to the legislature to alter, amend or repeal charters, authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant or any rights vested under it and which the legislature may deem necessary to secure that object or any public right. The power of alteration and amendment is not without limitation, but must be in good faith and consistent with the specified object of the charter. See Jackson, J., afterwards Justice of the Supreme Court in Hill *v.* Railroad Co., 41 Fed. Rep. 610; San Joaquin & Kings River Co. *v.* Stanislaus County, 113 Fed. Rep. 930, in the Circuit Court Northern District of California; Shields *v.* Ohio, 95 U. S. 319.

[2] Wells *v.* Savannah, 181 U. S. 531.

[3] C. B. & Kansas City R. Co. *v.* Guffey, 120 U. S. 569; Ford *v.* Delta & Pine Land Co., 164 U. S. 662; Southwestern R. Co. *v.* Wright, 116 U. S. 231; Wilmington & Weldon R. Co. *v.* Alsbrook, 146 U. S. 279.

[4] Ford *v.* Delta Pine Land Co., *supra;* Tucker *v.* Ferguson, 22 Wall. 527; Railroad Co. *v.* Loftin, 105 U. S. 258.

its shares, which was to be in lieu of all other taxes, and it was authorized to hold real estate sufficient for its place of business, the immunity from taxation was held to extend only to so much of the building as was required for the actual wants of the bank.[1] Where the exemption from taxation is limited in time, or is to continue only until the happening of a certain event, as the completion of the railroad, such limitation is strictly enforced.[2]

An exemption for a definite time is equivalent to the express power to tax after that time.[3]

§ 87. "Immunity" and "privilege" distinguished.

The later decisions of the court in requiring that the contract of exemption must be clearly stated, are materially more stringent. It was said by the court in a recent opinion,[4] l. c. page 179: "It cannot be denied that the decisions of this court are somewhat involved in relation to this question of exemption. It is difficult in some cases to distinguish the language used in each so far as the results arrived at by the court can be seen to be founded on a real difference in the meaning of such language."

In this case the plaintiff had been chartered with "all the rights and privileges" of another company, which in turn had been granted "all the rights, privileges and immunities" of a third company, the last having a limited exemption from taxation. It was held that this did not give the first named company any exemption. Exemption from taxation, it was said, is more accurately described as an "immunity" than as a "privilege," and the later opinions of the court show that there must be other language than the

[1] Bank *v.* Tennessee, 104 U. S. 493.

[2] Bailey *v.* Magwire, 22 Wallace, 215.

[3] Railroad Co. *v.* Gaines, 97 U. S. 697; Vicksburg R. Co. *v.* Dennis, 116 U. S. 665.

[4] Phoenix Fire & Marine Ins. Co. *v.* Tennessee, 161 U. S. 174.

mere word "privilege," or other provisions in the statute removing all doubt as to the intention of the legislature, before the exemption will be admitted. The court conceded that some of its earlier decisions are inconsistent with this ruling.[1] It laid stress in this case upon the absence of the word "immunity."

In another case decided at the same time[2] the court held that, where a company was organized with "all the powers, rights, reservations and liabilities of another company," the former was not entitled to the limitation of taxation provided in the charter of the latter company.

§ 88. Lost by change of corporate business.

So also an exemption granted to a corporation for the transaction of a particular business, is lost by a charter change in the business accepted by the corporation. Thus an insurance company with a chartered limitation of taxation, secured a change of its corporate business and objects to those of a bank. Prior to this the new constitution of the State had prohibited all exemption. The court held that this change from insurance to banking was material and radical and that the exemption was lost.[3]

§ 89. Lost by repeal before incorporation or issue of stock.

A corporation chartered before the adoption of a new constitution but not actually organized until after its adoption, was held subject to the provisions of the new constitution, which nullified the tax limitation contained in the charter.[4]

[1] Humphrey *v.* Pegues, *supra;* Tennessee *v.* Whitworth, *infra.*
[2] Home Insurance Co. *v.* Tennessee, 161 U. S. 198
[3] Memphis City Bank *v.* Tennessee, 161 U. S. 186.
[4] Planters' Insurance Co. *v.* Tennessee, 161 U. S. 193.

And new stock issued after the adoption of a constitution forbidding tax exemptions is not entitled to the exemption from taxation granted to the original stockholders.

§ 90. Tax exemption is a personal immunity.

A contract of tax exemption is an immunity personal to the grantee, and cannot be enforced by an assignee or purchaser at foreclosure sale or otherwise, unless the right to assign such immunity is clearly given in the grant.[2]

Thus in the case of a railroad corporation exempted from taxation upon its property and purchased at sale in foreclosure by a company declared by statute to succeed to all the franchises, rights and privileges of the first company, it was held that the immunity from taxation did not pass to the purchaser.[3] It was urged that it passed under the word "franchise;" but on this point the court said, quoting Morgan *v.* Louisiana, 93 U. S. 217, 223, l. c. page 185: —

§ 91. Transferable franchise defined.

"Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the

[1] Bank of Commerce *v.* Tennessee, 163 U. S. 416.

[2] Trask *v.* Maguire, 18 Wall. 391; Morgan *v.* Louisiana, 93 U. S. 222; Railroad Co. *v.* Hamblen, 102 U. S. 273; Wilson *v.* Gaines, 103 U. S. 417; L. & N. R. R. Co. *v.* Palmes, 109 U. S. 244; Memphis Railroad Co. *v.* Commissioners, 112 U. S. 609; Picard *v.* Tennessee &c. R. Co., 130 U. S. 637; C. & O. R. R. Co. *v.* Miller, 114 U. S. 176.

[3] C. & O. R. R. Co. *v.* Miller, *supra*.

company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction."

§ 92. Railroad consolidations and tax exemptions.

This principle has been applied in numerous cases of railroad consolidations. If the consolidation of two companies does not necessarily work a dissolution of both and the creation of a new corporation, and the two companies retain their original status toward the public and the State, the exemption may continue as if the consolidation had not taken place, limited however to the corporate property on which it was originally granted.[1]

Thus where two railroad corporations, whose shares are by a State statute exempt from taxation in the State, consolidate themselves into a new company under a State law which makes no provision to the contrary, and issue shares in the new company in exchange for shares in the old companies, the same exemption applies.[2]

[1] Central Railroad & Banking Co. *v.* Georgia, 92 U. S. 665; Branch *v.* City of Charleston, 92 U. S. 677.

[2] Tennessee *v.* Whitworth, 117 U. S. 129. See also Tomlinson *v.* Branch, 15 Wall. 460.

The same exemption was held to apply where two companies, whose stock was exempt in one State, consolidated with a third company created under the laws of another State. The new stock issued was held exempt from taxation in the former State, in the absence of a statute there to the contrary.[1] If the stock of only one of the roads is exempt however, the exemption will be limited to that part of the consolidated road.

But where the company enjoying an exemption is consolidated with another and dissolved in the new corporation, so that a new grant of the corporate franchise is made, such new corporation becomes subject to the provisions of the State statute prohibiting exemptions.[2]

§ 93. Corporate exemption limited to specific form of taxation.

In a series of cases known as the Tennessee Bank and Insurance Cases, the subject of the application of contract exemption to the different forms of corporate taxation was thoroughly considered.

Where the charter of a bank provided that it should pay a certain tax to the State on each share "which should be in lieu of all other taxes," a subsequent law imposing an additional tax on the shares in the hands of the shareholders was void.[3] The court enumerated in its opinion some of the different subjects of corporate taxation, and said that this enumeration shows the searching and comprehensive taxation to which such institutions are subjected

[1] Tennessee *v.* Whitworth, 117 U. S. 139.

[2] St. Louis, Iron Mtn. & So. R. Co. *v.* Berry, 113 U. S. 465; Railroad Co. *v.* Georgia, 98 U. S. 359; Yazoo & Miss. Val. R. Co. *v.* Adams, 181 U. S. 580; Keokuk & Western R. R. Co. *v.* Missouri, 152 U. S. 301.

[3] Farrington *v.* Tennessee, 95 U. S. 679; three judges dissented, holding that the exemption was of the stock and property of the corporation and not of the shareholders.

where there is no protection by previous compact. In another case, Chief Justice Waite, for the court, said: [1] —

"In corporations four elements of taxable value are sometimes found: 1, franchise; 2, capital stock in the hands of the corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders."

§ 94. The property of corporations and shareholders distinguished in contracts of exemption.

The disposition of the Supreme Court in later cases to construe strictly all contracts of exemption is illustrated by its recognition and enforcement of the legal fiction of the distinction between the property of the corporation and the rights of the shareholders in such property. Thus, the court said [2] that, although there were expressions in the former opinions lending color to another view, there is a distinction between the capital stock of a corporation and the shares of stock of the shareholders, and the taxation of one is not the taxation of the other. So, where the charter required a banking corporation to pay to the State a certain annual tax on each share of capital stock, which should be in lieu of all other taxes, it was held that while this limited the amount of tax on each share of stock in the hands of the shareholders, it did not apply to nor cover the case of the capital stock of the corporation or its surplus or accumulated profits. On the contrary such capital stock, surplus and accumulated profits were liable to be taxed to the corporation as the State might determine.

It was claimed that a different ruling had been made in the case of Gordon *v.* Appeals Tax Court, *supra*, page 47,

[1] Tennessee *v.* Whitworth, 117 U. S. 136.

[2] Shelby County *v.* Union & Planters' Bank, 161 U. S. 149; Union & Planters' Bank *v.* Memphis, 49 C. C. A. 455.

where it was said with reference to the taxation of the bank and the stockholders, "the aggregate could not be taxed without its having the same effect upon the parts that the tax upon the parts would have upon the whole." The court said that there was a difference in the language of the charter in the two cases. "Giving to the Gordon case the full weight of authority for the point actually decided, it does not hold that language, such as we have in the case under consideration, operates to exempt both the capital stock of the corporation and the shares of stock in the hands of its shareholders from all taxation beyond that mentioned in the charter, and we are entirely unwilling to unnecessarily extend the authority of that case so as to cover the question here."[1]

The same principle has been applied when the capital of the bank has been exempted from taxation, so that this exemption did not extend to the property right of the shareholders.[2]

§ 95. **Capital stock and surplus of corporations.**

In another case, the charter provided for a tax of a certain amount on each share of stock, which should be in lieu of all other taxes, and the court held[3] that this only limited the amount of tax on each share of stock in the hands of the shareholders, and did not prevent the taxation of the surplus of the corporation. It said, at page 146: "The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of

[1] Mr. Justice White dissenting.

[2] New Orleans *v.* Citizens' Bank, 167 U. S. 371; Tennessee *v.* Whitworth, 22 Fed. Rep. 75.

[3] Bank of Commerce *v.* Tennessee, 161 U. S. 134.

the shareholders may both be taxed, and it is not double taxation." It was claimed in this case that the surplus of the corporation was exempt from taxation. But the court said that the surplus is corporate property, and is distinct from the capital stock in the hands of the corporation. The exemption was not greater in its scope than the subject of the tax, it said, and added, page 147: —

"Recognizing, as we do, that there is a different property in that which is described as capital stock from that which is described as corporate property other than capital stock, and remembering the necessity there is for a clear expression of the intention to exempt before the exemption will be granted, we must hold that the surplus has not been granted exemption by the clause contained in the charter under discussion. The very name of surplus implies a difference. There is capital stock and there is a surplus over, above and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders." [1]

§ 96. **Special assessments.**

The State of Arkansas in order to encourage the reclamation of swamp and overflowed lands, provided that they should be exempt from taxation for the term of ten years, or until they should be reclaimed, and issued transferable scrip receivable in payment for them. Subsequently they were subjected to both general and special taxes. The Supreme Court held that the exemption was valid as to both forms of taxation, and that the repeal impaired a contract made with the holders of the scrip issued by the State. It said that the law itself contemplated the building of levees

[1] As to enforcing the fiction of the distinct property-rights of the corporation and shareholders in respect to the taxation of Federal securities, see *supra*, § 19.

and drains, and the exemption was intended to be an exemption from taxation therefor.[1] But it was held in a later case[2] that this case was decided on its special facts, because special taxes were in contemplation of the parties in making the contract of exemption, and that it was competent for the State to exempt any particular property from the burden of either kind of taxation. But an exemption from taxation as a rule relates only to the burden of ordinary taxes, and does not include the cost of local improvements.

[1] McGee *v.* Mathis, 4 Wallace, 143.
[2] Ill. Central R. Co. *v.* Decatur, 147 U. S. 204.

CHAPTER III.

REGULATION OF COMMERCE.

§ 97. Express restraint upon taxing power of State.
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"The Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes." Const. U. S., Art. I, Sec. 8, Par. 3.

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." Const. U. S., Art. I, Sec. 10, Par. 2.

§ 97. Express restraint upon taxing power of State.

The strong feeling of jealousy against the national power which confronted the framers of the Constitution is illustrated in the fact that the only specific restraint upon the taxing power of the States, that against imposts or duties on imports and exports, is qualified by the provision that such imposts or duties may be laid with the consent of Congress and for the benefit of the national treasury. This qualified right to the States of levying duties and imposts may have been adopted as one of the compromises of the Constitution in overcoming the strong objection made by the States to the power of internal taxation given to Congress. But whatever the purpose, it has proven wholly superfluous, as no such duties and imposts have been laid since the foundation of the government. In view of the tremendous development of national commerce, it seems unlikely that this power will ever be exercised.

§ 98. Necessity for national control over commerce.

The necessity for national control over commerce, both interstate and foreign, was the immediate occasion, and indeed the moving purpose, in the adoption of the Constitution of the United States. In the words of Chief Justice Marshall: [1]—

"From the vast inequality between the different States of the confederacy as to commercial advantages, few

[1] Brown *v.* Maryland, 12 Wheat. 420, l. c. 438.

subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress."

In Cook *v.* Pennsylvania,[1] Justice Miller in the opinion of the Court says: —

"A careful reader of the history of the times which immediately preceded the assembling of the convention that framed the American Constitution cannot fail to discover that the need of some equitable and just regulation of commerce was among the most influential causes which led to its meeting. States having fine harbors imposed unlimited tax on all goods reaching the continent through their ports. The ports of Boston and New York were far behind Newport, in the State of Rhode Island, in the value of their imports; and that small State was paying all the expenses of her government by the duties levied on the goods landed at her principal port. And so reluctant was she to give up this advantage, that she refused for nearly three years after the other twelve original States had ratified the Constitution to give it her assent.

"In granting to Congress the right to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, and in forbidding the States without the

[1] 97 U. S. 566, l. c. p. 574.

consent of that body to levy any tax on imports, the framers of the Constitution believed that they had sufficiently guarded against the dangers of any taxation by the States which would interfere with the freest interchange of commodities among the people of the different States, and by the people of the States with citizens and subjects of foreign governments."

§ 99. Mr. Madison on necessity of national control of commerce.

The necessity of giving the central government the control over foreign commerce seems to have been conceded, even by the opponents of the Constitution. It was pointed out by Mr. Madison in the *Federalist*[1] that the national control over interstate commerce was essential to make the control over foreign commerce complete and effectual. Thus he said (pp. 262–263):—

"The defect of power in the existing confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added that without this supplemental provision, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the States, which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We

[1] Federalist, No. 42

may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity. To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain."

§ 100. National control of commerce, the comprehensive limitation.

Although the regulation of commerce was thus the great moving cause for the adoption of the Constitution, and was thoroughly discussed in the proceedings of the convention and in the *Federalist*, we find in neither any reference to any possible interference with the taxing power of the States growing out of such regulation. The far-reaching importance of national control over interstate and foreign commerce was not, and could not be, foreseen. If there had been no provision in the Federal Constitution specifically restraining the States from levying duties or imposts on imports and exports, such limitation would have been implied, and would necessarily have grown out of the exclusive power given to Congress to regulate such commerce. This is clearly shown by the reasoning in McCulloch *v.* Maryland and Brown *v.* Maryland. In like manner, the power to levy duties upon foreign commerce

would possibly be held included in the grant to Congress of exclusive jurisdiction over such commerce.

The important and comprehensive limitation upon the taxing power of the States therefore is that which is implied from and grows out of the control given by the Constitution to Congress over interstate and foreign commerce. As to the latter, we have the express prohibition against levying duties on imports or exports, and also the implied limitation growing out of the national control over foreign commerce. Commerce with foreign nations includes importing and exporting, and a State tax on imports or exports is necessarily an interference with foreign commerce. Thus, the great leading case of Brown *v.* Maryland, *infra*, is decided upon both of these grounds.

§ 101. Gibbons v. Ogden.

The relation of the commerce clause of the Constitution to the taxing power of the State cannot be understood without a clear apprehension of the judicial construction of that clause, and this begins with the great opinion of Chief Justice Marshall in Gibbons *v.* Ogden.[1] In this opinion, as in that of McCulloch *v.* Maryland, he cites no authorities, for there were none to cite. The grant by the State of New York of the exclusive right to navigate the waters of that State with boats propelled by fire or steam was held void, on the ground that it was against the coasting license granted by Congress, and was an interference with commerce between the States.

The opinion gave a broad and comprehensive construction of the term "commerce," which has been the basis of all subsequent adjudications. The Constitution is one of enumeration, and not of definition. The power to regulate is the power to prescribe the rules by which commerce is to

[1] 9 Wheaton, 1.

be governed, and this power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. As to the extent of the power of Congress, it was said, l. c. page 195: —

"But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State."

The argument was advanced that there was a concurrent power of regulating commerce in the States, as there was a concurrent power over internal taxation vested in the States and the Federal government, and on this point it was said, pp. 198, 199:—

"The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is

indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

The court said therefore that in any case of conflict, the Act of Congress is supreme, and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

It was conceded that commerce between the several States is restricted to that which concerns more States than one, and that completely internal commerce of the State

may be considered as reserved to the regulation of the State itself.

§ 102. Brown v. Maryland.

The first application of these clauses of the Constitution to the taxing power of the State was in 1837 in the case of Brown *v.* Maryland, wherein another great opinion of Chief Justice Marshall declared the line of limitation between the exercise of State and Federal authority. In McCulloch *v.* Maryland, the exemption from State taxation of the means employed by the general government had been declared; and in this case the same principle of Federal supremacy was extended to justify the limitation of a State's taxing authority by the national control over commerce.

The State of Maryland passed an act requiring every importer of foreign merchandise to take out a license, paying therefor fifty dollars. Conviction under the act was sustained by the Court of Appeals of Maryland, but it was declared unconstitutional by the Supreme Court, and the requirement of a license for conducting the business of an importer was held to come within the prohibition of a tax on imports, and to be also an attempted regulation of commerce.[1] As to the limitation of the State's taxing power by the paramount control of Congress over commerce, see *supra*, § 9. Commenting upon the circumstances attending the adoption of the Constitution, the court said, l. c. page 438: —

"From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exer-

[1] 12 Wheat. 419. The case was argued for Maryland by Mr. Taney, afterwards the successor of Chief Justice Marshall, and by Reverdy Johnson.

cised, or seemed disposed to exercise, the power of laying duties on imports." * * *

In reply to the argument that the abuse of power was not to be apprehended, it was said, l. c. page 439: —

"Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular State." * * *

It was urged that the tax was not upon the import but upon the importer, not upon the article but upon the person, and on this point the opinion proceeded, page 444: —

"It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution."

It was also urged that just as export means only to take goods out of the country, so to import means only to bring goods in. As to this, the court said that the United States

has the same right to tax occupations that is possessed by the States, but Congress cannot escape the prohibition against taxing exports by saying that a tax on the exporter is on the person and not on the article and that it has a right to tax occupations. A revenue cutter might be stationed off the coast for the purpose of levying a duty on all merchandise found on vessels which were leaving the United States for foreign ports, but, said the court, at page 445, "would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?"[1]

The right to import therefore includes the right to sell, and a license upon the business of an importer is a tax upon the right to sell, and therefore upon the right to import.

§ 103. Original package rule.

The court admitted the difficulty of setting a definite time when the taxing power of the State should begin, but fixed it as beginning when the original package in which the goods have been imported is broken up or sold, and thus was laid down the "original package rule" which has been the subject of so much judicial discussion. On this point the court said, at page 441: —

"The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons

[1] As to this illustration, see dissenting opinion of Chief Justice Fuller in Dooley *v.* United States, 183 U. S. 174, where it is applied to the tariff tax under the Foraker act on goods coming into Porto Rico from the United States.

and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."[1]

[1] Chief Justice Taney, the successor of Chief Justice Marshall, who appeared in this case as counsel for the State of Maryland, in his opinion in the License Cases, 5 Howard, 504, said at page 575; concerning this "original package" rule: —

"I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of the provisions in the Constitution."

§ 104. License tax on importer also void as regulation of commerce.

The court held further that the act imposing a license was also void as an attempted regulation of commerce. Any charge on the introduction of the article into the country, and its incorporation with the mass of the property therein, must be hostile to the power of Congress, since an essential part of its regulation and the principal object of it is to prescribe the regular means for accomplishing that introduction and incorporation. This could not abridge the acknowledged power of a State to tax its own citizens, because that power is subject to the paramount authority of Congress. On the historical setting of the commerce clause and the occasion of its adoption, it was said, l. c. p. 445: —

"The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress indeed possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not therefore matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all

foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

§ 105. Regulation of commerce during non-action of Congress.

In Gibbons *v.* Ogden, Congress had exercised its control over interstate commerce by granting a coasting license, and the decision of the court therefore was really based upon the invalidity of the exclusive grant by the State of New York as against the right granted by Congress. It was unnecessary therefore to decide the extent of the State's right, during the non-action of Congress, to exercise its police or taxing power, when such exercise might incidentally affect interstate commerce. This remained a *vexata quæstio*.[1]

Thus, in the License Cases, decided in 1847, where the question before the court was as to the validity of certain prohibitive or liquor license tax laws for some of the New England States, Chief Justice Taney said, at page 578: —

"The question, therefore, brought up for decision is, whether a State is prohibited by the Constitution of the United States from making any regulations of foreign commerce or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws upon the subject null and void."

All of the judges concurred in holding the State laws

[1] New York *v.* Miln, 11 Peters, 102; License Cases, 5 How. 504; Passenger Cases, 7 How. 283.

valid; some however concurring on the ground that the license laws were merely police regulations, although they might incidentally affect commerce.

Later the rule was laid down, that the power to regulate commerce is one, which includes many subjects, various and quite unlike in their nature; and that whenever these subjects are in their nature national or require one uniform system or plan of regulation, they may be justly held to belong to that class over which Congress has exclusive power of regulation; but that local and limited matters, not national in their nature, as pilotage and the like, may be regulated by the States during the non-action of Congress. The action of Congress however renders void such regulations of the States as conflict with it.[1]

§ 106. Freedom of interstate commerce.

Finally, nearly fifty years after the decision in Brown *v.* Maryland, the doctrine of the License Cases was definitely overruled by the Supreme Court and the rule established, that where the subject is national in its character, and therefore in its nature requires uniformity of regulation affecting all the States, *e. g.*, interstate transportation, including the importation of goods from one State into another, Congress alone can act, and its non-action means that commerce must be free. This ruling was made with reference to the importation of liquors into a State, where the sale of such liquors was prohibited.[2] The freedom of transportation there declared extends to the goods in their original packages. Thus the "original package", as first introduced in Brown *v.* Maryland in reference to foreign importations, becomes material in interstate commerce in

[1] Cooley *v.* Board of Wardens of Philadelphia, 12 Howard, 299.

[2] Bowman *v.* Railway Co., 125 U. S. 508; Leisy *v.* Hardin, 135 U. S. 100, p. 119 and cases cited.

limiting the police power of the State. In Leisy *v.* Hardin the rule is thus formulated by the court: —

"The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration, that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

§ 107. Consent of Congress to State regulation.

After the decision in Leisy *v.* Hardin, Congress enacted a statute known as the Wilson bill, providing that liquors transported into any State or Territory, or remaining therein for use, consumption, sale or storage, shall, upon arrival in such State or Territory, be subject to the operation and effect of its laws, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors had been there produced, "and shall not be exempt therefrom by reason of being introduced therein in the original packages or otherwise.[1] It was claimed that the act was invalid, because the Constitution guarantees freedom of commerce among the States in all things, and therefore Congress could not delegate its control over interstate commerce to the States. But the court said, at page 561, that "in surrendering their own power over external commerce, the States did not secure absolute freedom in such commerce, but only the protec-

[1] 26 Stats. 313, c. 728. This act was approved August 8, 1890, and was held constitutional by the Supreme Court in In re Rahrer, 140 U. S. 545.

tion from encroachment afforded by confiding its regulation exclusively to Congress."

§ 108. **Judicial construction of "arrival" in State.**

In a later case,[1] the court construed this statute as not applying to goods while in transit in the State before delivery to the consignee. It was claimed that, if the act was construed to apply to the goods the moment they reached the Iowa line and before the consummation of the contract of shipment, it would give the statutes of Iowa extra-territorial operation and would render the Act of Congress repugnant to the Constitution. But the court said that its construction of the statute, according to which "arrival" meant the completion of the shipment by delivery to the consignee, rendered it unnecessary to consider whether if the act of Congress had submitted the right to make interstate commerce shipments to State control, it would be repugnant to the Constitution.

§ 109. **Duties on imports relate only to foreign imports.**

Chief Justice Marshall said at the conclusion of the opinion in Brown *v.* Maryland: "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles." The tax in this case, it will be remembered, was upon the business of a foreign importer. In 1860 a stamp tax imposed by the State of California upon a bill of lading for merchandise shipped from San Francisco to New York was held to be in effect a tax upon exports, and therefore invalid, the words "imports and exports" in the Constitution being assumed to

[1] Rhodes *v.* Iowa, 170 U. S. 412. See *infra*, section 125, for more complete statement.

include importations from one State into another. The opinion was by Chief Justice Taney.[1]

But in 1868 a tax levied in Mobile upon all sales of merchandise was claimed to be invalid, because it was laid on the sale of merchandise brought from other States while it remained in the original packages. It was urged that the case was controlled by the Almy case, *supra*, where the court had adopted the remark in the opinion in Brown *v.* Maryland, *supra*. But the court held, opinion by Justice Miller,[2] that the words "imports and exports" as used in the Constitution, had exclusive reference to foreign trade.

§ 110. **Woodruff v. Parham.**

With reference to the decision in Brown *v.* Maryland, the court said, at page 130: —

"That decision has been recognized for over forty years as governing the action of this court in the same class of cases; and its reasoning has been often stated and received with approbation in others to which it is applicable. We do not now propose to question its authority or to depart from its principles. The tax of the State of Maryland, which was the subject of the controversy in that case, was limited by its terms to importers of foreign articles or commodities, and the proposition that we are now to consider is whether the provision of the Constitution to which we have referred extends, in its true meaning and intent, to articles brought from one State of the Union into another."

The court said further that the actual remark of Chief Justice Marshall in the opinion at the conclusion of Brown *v.* Maryland could only be received as an intimation of what the court might have decided, if such a case had ever come before it, and the remark might have referred only to the matter of discriminating taxes in domestic commerce.

[1] Almy *v.* California, 24 Howard, 169.

[2] Woodruff *v.* Parham, 8 Wallace, 123.

The case of Almy *v.* California, *supra*, was also declared to have involved an interference with interstate, not foreign, commerce, although it was not so stated in the opinion. The court added: "We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made." As to the License Cases,[1] the court said it was very doubtful if any material proposition was decided, though the precise question involved in the case at bar was before the court and seemed to require solution. The words "imports and exports" are frequently used in the Constitution and have a necessary correlation, and the same words are used with reference to the taxing power of Congress. It was obvious that if articles brought from one State into another were exempt from taxation, even under the limited circumstances laid down in Brown *v.* Maryland, the grossest injustice must prevail and equality of the public burden in our large cities would be impossible. The application of this original package rule would practically exempt from all taxation the wholesale merchants who bought their goods in original packages.[2]

§ 111. Importations from other States taxable in original packages.

The original package rule therefore as laid down in Brown *v.* Maryland does not prevent the taxation of merchandise brought into one State from another, even though it remains in the original packages. In this respect such merchandise is sharply distinguished from foreign goods

[1] 5 Howard, 504.

[2] Justice Nelson dissented, claiming that the absence of discrimination would be entirely worthless as a protection against the taxation of interstate commerce; that the coal of Pennsylvania could be taxed in New York, the salt and plaster of New York in Pennsylvania, the grain and flour of the West in Massachusetts, and the lumber of Wisconsin in Illinois, and so on.

which are exempt from taxation while in the original packages and in the hands of the importer.

In later cases the ruling in Woodruff *v.* Parham has been reaffirmed. The principle was applied to shipments of coal from Pennsylvania by water to New Orleans, to be sold in open market there. It was held[1] that, though still on the river at New Orleans, it was intermingled with the general property in the State and subject to taxation, although it might be sold from the vessel, without being landed, and for the purpose of being taken out of the country on a vessel bound for a foreign port. It was subject to the taxing power of the State, because when the tax was levied, the coal was held in New Orleans for sale, and it was immaterial that thereafter some of it might have been sold for export. "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods intended for exportation."[2]

In Brown *v.* Houston, the court also said, at pp. 633, 634: —

"When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used

[1] Brown *v.* Houston, 114 U. S. 622; Pittsburgh, etc., Coal Co. *v.* Bates, 156 U. S. 577.

[2] The court added, p. 629: "Whether the last would be a duty on exports it is not necessary to determine."

or sold, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States?" * * *

§ 112. Tax must be without discrimination.

But the tax must be without discrimination as between the domestic and non-domestic goods. While property brought in from other States, although remaining in the original packages, can be taxed, it must be taxed as property in common with other property in the State, and there must be no discrimination against it. On this point the court said, at page 634, in the case last cited: —

"We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the city of New York, charged with the duty of collecting a tax on every wagon load, or car load of produce and merchandise brought into the city, that it would not be a regulation of, and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other States. We think it would be, and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of *Woodruff* v. *Parham*, which had no relation to the movement of goods from one State to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city, and in precisely the same manner.

"When Congress shall see fit to make a regulation on the subject of property transported from one State to

another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State."

§ 113. Taxability of goods from other States not affected by decision in Leisy v. Hardin.

After the decision of the Supreme Court in Leisy *v.* Hardin, *supra*, wherein the whole subject of the power and jurisdiction of the State over property brought in from other States in the course of interstate commerce was examined, and the freedom of interstate commerce in the absence of congressional legislation asserted, the court was urged to overrule Brown *v.* Houston, on the ground that it had been in effect overruled by Leisy *v.* Hardin and other later decisions of the Supreme Court. In this case the coal, which had been brought down the river from Pittsburgh, was afloat at Baton Rouge in the original barges in which it had been exported from Pennsylvania. The court however reaffirmed its decision.[1] It said that as the coal was subjected to no discrimination in favor of the products of Louisiana, but treated in exactly the same way, the tax was valid. It was not a tax imposed upon the coal as a foreign product, nor by reason of its being brought to Louisiana, nor while it was in a state of transit through Louisiana.[2]

§ 114. Original package in interstate commerce as to State police authority.

It will be observed that there is a distinction between the taxing power of the State and its police power with refer-

[1] Pittsburgh Coal Co. *v.* Bates, 156 U. S. 577.

[2] In American Fertilizing Co. *v.* Board of Agriculture of Nor. Car., 43 Fed. Rep. 609, decided in 1890, the opinion was expressed that "Woodruff *v.* Parham, as well as the License cases, may be considered overruled by Leisy *v.* Hardin."

ence to the original packages in interstate shipments. Under the rulings referred to, Leisy *v.* Hardin and Bowman *v.* Railway Co., *supra*, in the absence of legislation by Congress, commerce between the States must be free. The State therefore in the exercise of its police power cannot exclude the products of other States, even though it may conclude that they are injurious to its people; but when these products are admitted into the State, they become subject to its taxing power equally with its own products. Thus, in a recent case,[1] the act of the State of Pennsylvania prohibiting the introduction of oleomargarine from another State and its sale in the original package was held void as an interference with interstate commerce. It was held that oleomargarine is a lawful article of commerce, and that, while a State can regulate its introduction so as to insure purity, it cannot wholly exclude it. The right of the importer to sell in the original package does not depend upon whether such package is suitable for retail trade or not. The court said however, at page 24: "We do not say or intimate that this right of sale extended beyond the first sale by the importer after the arrival of the oleomargarine in the State."

But in a later case[2] the court sustained a conviction under the laws of Tennessee, for the sale of cigarettes in what were claimed to be original packages, on the ground that the size of the package was such as to indicate, under the circumstances, that it was prepared for the purpose of evading the law.

§ 115. What is an original package?

It is therefore necessary to determine what is an "original package," in regard both to importations from abroad

[1] Schollenberger *v.* Pennsylvania, 171 U. S. 1, Justices Harlan and Gray dissenting.

[2] Austin *v.* Tennessee, 179 U. S. 343.

and shipments from one State to another. In the case of foreign importation, the State cannot exclude nor can it tax either the business or the import, so long as the latter is in the hands of the importer in its original package. The State cannot exclude nor prevent the sale of shipments from another State in the original packages, but it can tax them, provided it does so without discrimination between that and the other property of the State. The determination of what is an original package therefore becomes important, both with reference to the police and the taxing authority of the State.

In a recent case from Louisiana the Supreme Court held that the "original package" means the box or case in which the goods are shipped, and not the package in which they were placed by the manufacturer when manufactured, and before they were encased in the larger boxes for shipment.[1] Thus packages of laces, household linens, etc., were held to lose their exemption when taken out of the boxes or cases in which they were shipped. The court said that to extend the exemption to the manufacturer's packages would mean that the power of the State to tax imported goods would depend upon the form in which the European manufacturer or packer shipped them to this country. Thus if he shipped fifty Geneva watches, all he need do would be to put each watch in a separate case.

In the Pennsylvania oleomargarine case, *supra*, a ten pound package of oleomargarine was held to be an "original package." But in Austin *v.* Tennessee the paper packages containing ten cigarettes unboxed or thrown loosely into baskets were held not to be "original packages" within the meaning of the court's decisions.[2] Justice

[1] May *v.* New Orleans, 178 U. S. 496, affirming 51 La. Ann. 1064, four judges dissenting, Chief Justice Fuller and Justices Brewer, Shiras and Peckham.

[2] In this case Justice White concurred in a separate opinion, and Justices Brewer, Shiras and Peckham and Chief Justice Fuller dissented.

Brown in the opinion says, at page 359: "The real question in this case is whether the size of the package in which the importation is actually made is to govern or the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view." And after describing the packages he says, l. c. p. 361: "And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. We can only look upon it as a discreditable subterfuge to which this court ought not to lend its countenance. If there be any original package at all in this case, we think it is the basket and not the paper box."[1]

§ 116. Theory of exemption of original packages from State laws.

In Austin *v.* Tennessee the court thus explains the theory of the exemption of the original package from the operation of State laws, l. c. page 359:—

"The whole theory of the exemption of the original package from the operation of State laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State.

[1] For discussion in the State courts of what is an "original package" see Commonwealth *v.* Schollenberger, 156 Pa. 201, reversed by the Supreme court, *supra;* State *v.* Parsons, 124 Mo. 436, where separate medicine bottles boxed for shipment were held not to be original packages; Keith *v.* Alabama, 97 Ala. 32, 10 L. R. A. 430, where a similar ruling was made as to half-pint, pint and quart whisky bottles.

It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words "original package" in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers and thus bid defiance to the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the State with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a *bona fide* package of a particular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the law of another State, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far-reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister State, we should be compelled to

recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the State and import it in minute quantities." [1]

[1] Justice White in his concurring opinion said that if he thought either the opinion or the conclusion had the effect of weakening the doctrine upheld by Leisy *v.* Hardin, 135 U. S. 100, and Rhodes *v.* Iowa, 170 U. S. 412, he would be unable to concur. But under all the circumstances he was constrained to conclude that each particular parcel of cigarettes was not an "original package" as defined by the previous adjudications of the court. Justice Brewer in his dissenting opinion, concurred in by Chief Justice Fuller and Justices Shiras and Peckham, said that the case was reversed on the single proposition of the size of the package of cigarettes, and that he searched the Constitution of the United States in vain for any intimation that the power of Congress over interstate commerce ceases when the packages in which that commerce is carried are of any particular size. And on page 381 he said: "Apparently the dividing line as to the size of packages must be somewhere between that of a ten pound package of oleomargarine and that of a package of ten cigarettes; but where? Must diamonds, in order to be within the protecting power of the nation, be carried from State to State in ten-pound packages?" And on the suggestion that diamonds are not a subject of police regulation, while cigarettes are, he says: "Concretely it amounts to this: the police power of the State, the power exercised to preserve the health and morals of its citizens, may prevent the importation and sale of a pint of whisky, but cannot prevent the importation and sale of a barrel; or in other words, the greater the wrong which is supposed to be done to the morals and health of the community, the less the power of the State to prevent it. That may be constitutional law, but to my mind it lacks the saving element of common sense." He said further that Chief Justice Marshall had said, in Brown *v.* Maryland: "'In the original form or package in which it was imported,' not in which 'it might have been' or 'ought to have been imported.' Obviously it did not occur to him that the form or package which the importer might adopt in any way affected the power of Congress over the importation." The court, he continued, should not overlook the changes in the modes of transportation. At the time that Chief Justice Marshall wrote the opinion in Brown *v.* Maryland, transportation was carried on by water in sailing vessels, and on land largely in lumber wagons. It is not strange that at that time all trans-

§ 117. **Exemption only extends to importer.**

The exemption from taxation of imported goods in the original packages applies only in favor of the importer, and therefore does not extend to the goods, even while they are in the original packages, after they have been sold by him. Thus, in Waring *v.* The Mayor,[1] goods imported in the original packages were sold while still on the vessel, which was anchored in the harbor waiting for the lighters to load her cargoes and carry them to the town. They were held subject to taxation as the property of the purchaser, and such purchaser could be taxed upon his occupation or the amount of his sales. In this case the purchaser was in the habit of buying the entire cargo and selling it in the original packages to traders. Merchandise in the original packages when once sold by the importer is therefore taxable like other property, provided of course it is taxed without discrimination, as it has lost its distinctive character as an import.

§ 118. **Form of tax is immaterial.**

It is immaterial whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the importer which is subject to an *ad*

portation was of goods packed in large boxes, securely fastened to prevent accidents from the rough and tumble way of transportation. There were then no express companies for the carrying of small packages. All that mode of transportation has grown up in this country within the last sixty years. But the express companies carrying their small packages from State to State are just as certainly engaged in interstate commerce as the old-fashioned lumber wagons carrying commodities between the same places. The facilities of transportation are increasing rapidly, and with them the cost of such transportation is diminishing, so that more and more will it be true that the small packages will be the frequent subject of transportation as between State and State. He therefore insisted that it was for Congress, and not for the State, to make modifications in the rule, if circumstances required.

[1] 8 Wallace, 110.

valorem tax.[1] So the exemption extends to the goods in the original packages in the warehouse so long as they remain the property of the importer.[2] A tax is likewise invalid which is laid by a State on the amount of sales made by an auctioneer, when applied to the imported goods in the original packages.[3] An importer has the right not only to sell in person, but also to employ an agent to sell for him, and this right to sell cannot be made to depend upon whether the original package is suitable for the retail trade or not, provided it is a *bona fide* package, not made for the purpose of evading the law.[4]

In Cook *v.* Pennsylvania, the court held that a tax on sales made by an auctioneer is a tax on the goods sold, within the terms of Waring *v.* The Mayor, and indeed of all the decisions cited; and when applied to foreign goods sold in the original packages by the importer, before they become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports.

§ 119. Intent to export is insufficient to exempt from taxation.

The fact that capital is uniformly and continuously employed in the business of purchasing goods for exportation from the United States to foreign countries is not sufficient to avoid an assessment on the ground that it is money employed in exportation, if such capital is in fact on hand as money on the day the assessment is made. The court said[5] that as it did not appear that the capital in question was actually invested in goods for export on that day, it was not

[1] Low *v.* Austin, 13 Wallace, 29.
[2] Siegfried *v.* Raymond, 190 Ill. 424.
[3] Cook *v.* Pennsylvania, 97 U. S. 566.
[4] See Schollenberger *v.* Pennsylvania, and Austin *v.* Tennessee, *supra.*
[5] People *v.* Commissioners, 104 U. S. 466.

necessary to decide what would have been the effect if it had been so invested.

§ 120. **Property in commercial transit.**

The same principle applies to the claim of exemption from taxation on the ground that property is actually in commercial transit. Property which is in commercial transit through a State has no *situs* for taxation therein, whether destined for another State or for foreign shipment. Any attempt therefore by a State to tax such property is a direct interference with interstate commerce. But the property must be actually in transit. Intent to export property or to send it to another State is not sufficient to exempt it from taxes.

It is not necessary that property should be actually on the cars or steamers, as it has been held to be in commercial transit when it is at the point of shipment awaiting loading. Thus also delay within the State no longer than is necessary for convenient trans-shipment to its destination will not give the property a *situs* in the State, so as to subject it to the State's taxing laws.[1] Where corn had been removed from its place of production and placed temporarily in cribs to await loading on cars for shipment, it was held to have no taxable *situs* as property of the non-resident owner, the court saying, at page 747:[2] —

"It would seriously cripple and obstruct commerce in the productions of this State and thus inflict a great injury upon our own people if a purchaser could not temporarily deposit the property purchased in cribs or warehouses to await the means of transportation."

[1] State *v.* Engle, 34 N. J. L. 425.

[2] Ogilvie *v.* Crawford County, U. S. Cir. Ct. of Iowa, 7 Fed. Rep. 745. The court distinguished the case of Carrier *v.* Gordon, 21 Ohio, 605, as there the property was not in transit, but plaintiffs intended to remove it on the opening of navigation.

But the intent to export is not sufficient.[1] The goods must be actually in commercial transit.

§ 121. **Coe v. Errol.**

A leading and illustrative case on this point is Coe *v.* Errol.[2] The plaintiff, a resident of New Hampshire, owned spruce logs, drawn down during the winter before from the mountains of New Hampshire to the banks of a stream in the town of Errol, New Hampshire, thence floated down the river in the spring to the State of Maine. It was held that they were properly appraised for taxation in Errol.

The court decided, opinion by Justice Bradley, that the products of a State, though intended for exportation and partially prepared for that purpose, are liable to be taxed like other property at the point where they are deposited, and that they are not exempted from taxation by the owner's preparation to ship them; that this is not the case of goods in course of transportation through a State, though detained for a time therein, by low water or other causes. When the products of the farm or forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or railroad, such products are not yet in process of transportation, but they are a part of the general mass of property in the State, subject to its jurisdiction, in the same way as other property therein. They cannot be taxed as exports; they are not yet exported and may never be exported. The mere intention to export is not sufficient. The court declared that, if the intention to export were sufficient, in many States there would be nothing left to tax but real estate, and added, l. c. page 528: —

[1] Myers *v.* Baltimore County Commissioners, 83 Md. 385.

[2] 116 U. S. 517.

"Carrying it from the farm, or the forest, to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

§ 122. Same rule in interstate as in foreign shipments.

In its opinion in this case the court used the words "export" and "exportation" in reference to a shipment to another State, although it had already held in Woodruff *v.* Parham, *supra*, that the terms "imports" and "exports" as used in the Constitution in the clause under consideration referred only to foreign shipments. The principle is obviously the same whether the shipments are intended for another State or for a foreign country. In either case the goods must be actually in transportation or awaiting the means of transportation to be exempt from the taxing power of a State.

In a case decided at the following term,[1] the principle laid down in Coe *v.* Errol was considered with reference to the prohibition upon Congress in the Constitution against taxing exports. The court held that an excise laid on tobacco requiring it to be stamped before it is removed from the factory is not a duty on exports, even though the tobacco be intended for exportation. It stated that a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. "How can the officers of the United States, or of the State, know that goods apparently part of the general mass and not in course of exportation, will ever be exported? Will the

[1] Turpin *v.* Burgess, 117 U. S. 504.

mere word of the owner that they are intended for exportation make them exports? This cannot for a moment be contended. It would not be true and would lead to the greatest frauds." And the court added at page 507: —

"It is true, as was conceded in Coe *v.* Errol, that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign countries; yet the decision in that case was based on the postulate that when such imposts or duties are laid on imports or exports from one State to another it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress. So that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in the other."

§ 123. Taxation of floating logs and droves of sheep.

The same principle was applied in the case of pine logs, cut in Wisconsin, and put upon the ice for the purpose of floating them down stream to the St. Croix river as soon as there was sufficient rise in the river. The court held that the logs were properly taxed in the town where so held, while they were in preparation for transit;[1] and said it was immaterial that they might be taxed over again when they reached Minnesota and that this would amount to a second tax in the same year.

So sheep driven through a State have been held subject to taxation, if the purpose of driving is not wholly transportation, but comprehends also grazing them upon the natural grasses, not as a mere incident to the travel, but as one of the purposes of the movement. The court said the existence of a purpose to obtain grazing for the sheep

[1] Nelson Lumber Co. *v.* Town of Loraine, 22 Fed. Rep. 54.

united with the purpose of transportation is to be determined from all the facts in the case, including the course, the character of the territory grazed over, the time employed, the method of subsequent shipment intended, the ordinary facilities for transportation by other means, the place selected for commencing the drive and perhaps the time of year, and the eventual purpose of their transportation.[1]

§ 124. Termination of commercial transit.

The subject of commercial transit was recently considered by the Supreme Court with reference to the police power of the State, the particular point in issue being the time when goods shipped into a State become subject to its police laws. It was held[2] that the statute of Iowa making it a misdemeanor for any express or railway company to transport any intoxicating liquors from one place to another within the State, without being furnished a certificate from the county auditor that the consignee was authorized to sell such intoxicating liquors, could not be applied to a box of liquors shipped by rail from a point in Illinois to a citizen of Iowa at his residence in that State, while in transit from its point of shipment to its delivery to the consignee, without causing the Iowa law to be repugnant to the Constitution of the United States. Moreover, moving such goods in the station from the platform on which they were put on arrival to the freight warehouse was a part of the interstate commerce transportation. The court in this case construed the Act of Congress of August 8, 1890, *supra*, § 107, providing that liquors transported into a State should upon arrival become subject to its laws. The court said that the word "arrival" did not mean arrival at the State lines, but

[1] Kelley *v.* Rhodes (Wyo.), 39 L. R. A. 594.

[2] Rhodes *v.* Iowa, 170 U. S. 412.

arrival at their destination in the State and delivery there to the consignee. This construction of the statute rendered it unnecessary to consider whether, if the Act of Congress had submitted the right to make interstate commerce shipments to State control, it would be repugnant to the Constitution.[1] Although this decision was with reference to the police power of the State, the reasoning would seem equally applicable to the exercise of the taxing power. The decision turned, not upon the question of what constituted an original package, but upon whether the commercial transit was concluded. As it was not ended when it was in the freight warehouse of the railroad company awaiting delivery, it was still in commercial transit, and therefore not subject to either the taxing or the police laws of the State.

§ 125. Inheritance tax on aliens not tax on exports.

A law of Louisiana imposed a tax of ten per cent upon the inheritance going to any person not domiciliated in that State and not a citizen of any State or Territory in the Union. It was claimed that this was essentially a tax upon exports, and repugnant to the power of Congress to regulate commerce with foreign nations. But the court held, opinion by Chief Justice Taney,[2] that the tax was nothing more than the exercise of the power which every State and sovereignty possesses of regulating the manner and terms on which property, real or personal, within its dominion, may be inherited. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so

[1] Justices Gray, Harlan and Brown, dissenting, said that there had been an arrival in the State so as to subject the liquor to the exercise of the police power of Iowa within the letter and spirit of the Act of Congress.

[2] Mager *v.* Grima, 8 How. 490.

descending or bequeathed shall belong to the State. It was held also that the constitutionality of inheritance laws imposing taxation upon the State's own citizens is unquestioned, and it cannot be contended that aliens are entitled to any exemption. Indeed the court could see no objection to such a tax, even if imposed upon aliens exclusively. It had no concern with commerce or with exports. In answer to the argument that it was a tax on exports because it would be necessary to send abroad the inheritance, the court said that, if that argument was sound, no property would be liable to be taxed in a State when the owner intended to convert it into money and send it abroad.

§ 126. License tax on foreign-exchange broker not tax on exports.

A license tax of four hundred and fifty dollars, levied by the State of Louisiana on money and exchange brokers, was sustained in the case of a broker who claimed that it was invalid as to him, because he dealt in foreign exchange exclusively, and that the taxing of bills of exchange was taxing the necessary instruments of commerce. But the Court held[1] that this was not a tax on the bills of exchange, which under the law every person was free to buy or sell, but the tax was imposed for engaging in the business of a money or exchange broker. If a tax on the business of an exchange broker were invalid, all taxes on banks which deal in bills of exchange would be invalid. No one can claim an exemption from a general tax on the ground that the product sold may be used in commerce. The court concluded, page 82: —

"The taxing power of a State is one of its attributes of

[1] Nathan *v.* Louisiana, 8 How. 73. See Fairbank *v.* United States, 181 U. S. 283, holding a Federal tax on foreign bills of lading a tax on exports.

sovereignty. And where there has been no compact with the Federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all property and objects in the State which are not properly denominated the means of the general government, and as laid down by this court, it may be exercised at the discretion of the State. * * * Whatever exists within its territorial limits in the form of property, real or personal, with the exception stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation and there is no Federal power under the Constitution which can impair this exercise of State sovereignty."

§ 127. State taxing power in relation to imports and exports.

In the case last cited the court further defined the taxing power of the State in relation to the prohibition of duties on imports and exports as follows, l. c. p. 81: —

"No State can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation."

This was quoted and applied by the Court of Appeals of Maryland,[1] where it held valid a license tax on all those engaged in packing or canning oysters for sale or transportation, and whose place of business was in the State. It was claimed that the words "for transportation" made the law objectionable as an interference with commerce. The

[1] State *v.* Applegarth, 28 L. R. A. 812.

court said that the words "for sale" and "for transportation" were used to exempt those who packed or canned oysters for their own purposes; and further that the fact that oyster packers might transport their oysters outside of the State did not prevent it from taxing them for the prosecution of their business within its jurisdiction.[1]

§ 128. State tax upon alien passengers is void.

It was held in the Passenger Cases,[2] that the statutes of New York and Pennsylvania imposing taxes upon alien passengers arriving in the ports of those States were void. There is no opinion of the court, as such, as to the grounds of the decision.[3] Prior to this, in State of New York *v.* Miln,[4] a statute of New York requiring the master of a vessel to render the mayor a verified description of the names, ages, etc., of passengers was declared a proper police regulation.

The invalidity of the State tax upon passengers was again affirmed in 1875,[5] the court saying that the rule, which prescribed the terms or conditions upon which a vessel could discharge its passengers coming from foreign ports, was a regulation of commerce with foreign nations, and that it was immaterial that the statute did not come into operation until after the passenger had landed.

[1] It was held in the U. S. Circuit Court in California, In re Wong Yung Quy, 2 Fed. Rep. 624, that a corpse is not property; that the remains of human beings carried out of the State for burial in a foreign country are not exports within meaning of the Constitution, and that the permit fee of $10.00, under the statute of California, for removal of remains of deceased persons, was valid as a sanitary measure.

[2] 7 Howard, 283.

[3] See statement of the case in Henderson *v.* Mayor, 92 U. S., p. 269.

[4] 11 Peters 103. For an interesting view of the difference of opinion in the court at this time, see remarks of Justice Wayne, 7 How. 429 to 436, and Chief Justice Taney, pp. 487 to 490.

[5] Henderson *v.* Mayor of New York, 92 U. S. 259.

Still later, in 1881, another statute of New York was declared void,[1] which imposed a tax on every alien passenger and held the vessel liable for the tax, and it was immaterial that the act declared its purpose to be to raise money for the execution of the inspection laws of the State. The court said it was not valid as an inspection law, as that could only relate to property.[2]

§ 129. State inspection laws and interstate commerce.

The Constitution[3] excepts from the prohibition laid upon the States to levy duties on imports or exports what may be absolutely necessary for executing their inspection laws. The Supreme Court held that the tobacco inspection laws of Maryland were valid under this clause, and that the charges upon the tobacco for outage and storage were authorized by the Constitution.[4] Such charges were for services rendered and were therefore lawful. It was claimed that the act discriminated between different classes of exporters, in that it exempted from certain regulations those who packed tobacco for exportation in the county or neighborhood where it was grown. But the court held that such discriminations the State had the right to make. It did not however express any opinion as to the provisions of the Maryland law for the inspection of tobacco grown out of Maryland.

The inspection law of North Carolina was also sustained by the Supreme Court.[5] A charge of twenty-five cents

[1] People *v.* Compagnie Gen. Trans-Atlantique, 107 U. S. 59.

[2] In Head Money Cases, 112 U. S. 580, the court sustained an act of Congress imposing a duty of fifty cents on every alien passenger coming into the United States in steam or sailing vessels. See also Crandall *v.* Nevada, *supra*, § 20.

[3] Article 1, Section 10, paragraph 2.

[4] Turner *v.* Maryland, 107 U. S. 38.

[5] Petapsco Guano Co. *v.* North Car. Board of Agriculture, 171 U. S. 345.

per ton upon fertilizers, to pay the cost of inspection, was held to be reasonable and proper. The court said that, as it was competent for the State to pass laws of this character, the requirement of inspection and payment of the costs did not bring the act into collision with the power vested in Congress. The right to make inspection laws was not granted to Congress, but was reserved to the States, subject however to the paramount right of Congress to regulate foreign commerce and among the several States. If the charge should exceed what was necessary for executing the inspection laws, it would be an unauthorized interference with the free importation of goods and therefore void. But if the law is really an inspection law the charge fixed by the State must stand until Congress shall see fit to alter it in its paramount power over commerce. This right to make inspection laws applies to commerce between the States as well as to foreign commerce, although the words imports and exports in the same section relate only to foreign commerce. The scope of inspection laws is not confined to articles intended for exportation, but applies to importations and articles intended for domestic use [1]

[1] Neilson *v.* Garza, 2 Woods, 287. As to when the court will take judicial notice that the amount charged is unreasonably large for an inspection charge, see American Fertilizing Co. *v.* Board of Agriculture of North Carolina, 43 Fed. Rep. 609.

CHAPTER IV.

REGULATION OF COMMERCE CONTINUED.

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"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Const. U. S., Art. IV., Sec. 2.

§ 130. Era of discriminating State taxation.

The enforcement of the national control over interstate commerce has been prolific of litigation, both in the State and Federal courts, arising out of the conflict between the national supremacy on the one hand, and the authority of the States to impose business, occupation and so-called privilege taxes on the other. The clamor of local merchants for protection against competition from other States has been potent with State legislatures, as it was in the days of the Confederation before the adoption of the Constitution, and the result has been the enactment of discriminations in taxation favoring the citizens and the goods and products of the State as against the citizens and products of other States. During the long period when the Supreme Court gave no decided opinion as to the supremacy of the national power in interstate commerce, such discriminating statutes multiplied, until, in one form or another, they were on the statute books of nearly every State in the Union. Thus Justice Miller said in 1889:[1] —

"Notwithstanding for nearly one hundred years we have had in the Federal Constitution the declaration that Congress shall have power to regulate commerce among the several States, there are at this hour upon the statute books of almost every State laws violating that provision; and there is no doubt that if that clause were removed tomorrow, this Union would fall to pieces, simply by reason of the struggles of each State to make the property owned in other States pay its expenses. It was this tendency of each State to support its government out of taxes levied upon the property of other States, or on the produce or

[1] Lectures on the Constitution, p. 81.

merchandise which must go through one State to another, that more than any other one thing compelled the formation of the present Constitution."[1]

The declaration of the Supreme Court in the cases already referred to, that commerce between the States must be free from State control or interference, was announced at a time when changed economic conditions made intolerable the discriminating legislation of the States. The extension of railroad systems over the country, the promotion of facilities of intercourse and transportation, unknown at an earlier period, extended the market available to producers. Instead of the buyer seeking in his own locality the manufacturer or jobber, an army of commercial travelers covered the country, bringing the goods of the manufacturer and jobber to the door of the retailer or consumer. The methods of business were revolutionized.

§ 131. Privileges and immunities of citizens.

Where citizens of other States are concerned, not only is this discrimination in taxation in favor of citizens or residents of the State an interference with commerce, but at this point the comprehensive provision of the Constitution for the regulation of commerce is reinforced by the specific direction in the Constitution that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." This specific protection accorded to citizens of other States however, while it is included in the comprehensive guaranty of national control over commerce, falls far short of affording the necessary

[1] Justice Miller quotes from Mr. Van Buren in a speech in the Senate in 1826: "There are few States in the Union upon whose acts the seal of condemnation has not from time to time been placed by the Supreme Court. The sovereign authorities of Vermont, New Hampshire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, Missouri, Kentucky and Ohio have in turn been rebuked and silenced by the overruling authority of this court."

remedy. The right to carry on interstate commerce and to be free from discriminating restrictions therein is not limited to citizens. All non-residents of the State, and foreign corporations, which are not citizens within the meaning of Article IV, Section 2, are entitled to the protection of the Constitution in so far as they are engaged in interstate commerce.

In the earlier cases however, before the position of the Supreme Court in regard to the national control over commerce was distinctly declared, both provisions of the Constitution were invoked, and in some cases the judges of the Supreme Court have themselves differed in the grounds of their opinion as to the invalidity of such legislation, some assigning as a reason the violation of the privileges and immunities of citizens of other States and others the interference with commerce.[1]

Later decisions of the court however have declared all such discriminations void on the ground of interfering with commerce.

§ 132. Discrimination against non-residents an interference with commerce.

This was decided in the case of Ward *v.* Maryland.[2] The statute required all traders resident in the State to

[1] Crandall *v.* Nevada, 6 Wall. 35, *supra*, § 20; Ward *v.* Maryland, 12 Wall. 419. Thus Justice Miller, who delivered the opinion of the court in Crandall *v.* Nevada, decided in 1867, in holding a State tax on passengers passing through the State invalid, placed his decision on the ground that the tax was inconsistent with the relations of the State to the Federal Government, see *supra*, and doubted whether it could be avoided under the commerce clause; Justice Clifford and Chief Justice Chase based their opinion distinctly upon its being void under the commerce clause. In his lectures however delivered in 1889, Justice Miller speaks of the case as illustrative of the national regulation of commerce. See Miller on Const., p. 453.

[2] 12 Wallace, 419, reversing Ward *v.* State, 31 Md. 279.

take out licenses, varying from $12 to $150, according to the value of their stock, and required of non-residents an annual license of $300. The Supreme Court held that this was void as a violation of the privileges and immunities of citizens of other States. It declared that, if the States could impose discriminating taxes against citizens of other States, it would soon be found that the power conferred upon Congress to regulate interstate commerce was of no value, and that inequality of burden as well as the want of uniformity in commercial regulations was one of the grievances of citizens under the Confederation, which the new Constitution was adopted to remedy.[1] The rule, that any form of discrimination in taxation against non-residents is invalid has been enforced in many State cases.

In Walling *v.* Michigan,[2] this principle was applied to a statute of Michigan imposing a tax upon persons, who, not residing or having their principal place of business in the State, engaged there in the business of selling or soliciting the sale of liquors to be shipped into the State. The court held that such an act was necessarily a discrimination in favor of the products of the State, and was thus a regulation and restraint of commerce; and it was none the less a discrimination though the subsequent act imposed a greater tax upon all persons in the State engaged in manufacturing or selling liquors to be shipped outside of its confines. The subsequent act imposed a tax on domestic dealers but not on their drummers, while the tax on drummers and agents of non-residents remained, and this operated as a discrimination.

[1] Justice Bradley concurred in this case, on the ground that the act was violative of the national control over commerce, and that it would be violative, even if the same burden was put upon non-residents for selling goods as upon residents.

[2] 116 U. S. 446.

§ 133. Discriminating taxation condemned in State courts.

The same principle, that there must be no discrimination in taxation in favor of residents, since the decision in Ward *v.* Maryland has been recognized and applied in numerous decisions of the State courts. Thus statutes demanding licenses from non-resident peddlers, while exempting from the same requirement manufacturers, farmers and mechanics residing in the State, have been held void.[1]

In Pennsylvania, a borough ordinance was void, which discriminated against non-residents, by prohibiting them from peddling or selling goods from house to house without license, and fixed the fee at so high a figure as to amount to a prohibition, while it excepted residents of the borough from its operation.[2]

A New Hampshire statute provided that the court could grant peddlers' licenses, on proper application, to residents. The court held that the restriction was invalid under the Federal guaranty of equal privileges, and granted a license to a non-resident notwithstanding the restriction in the statute.[3]

An act authorizing the city of Philadelphia to require a license, except from Pennsylvania farmers peddling the products of their farms in the city;[4] and a similar ordinance of the city of Buffalo relating to the sale of farm products, and excepting retail sales by residents of the State and owners or lessees of lands within the State, and

[1] Commonwealth *v.* Myer, 92 Va. 809; Rogers *v.* Kent Circuit Judge, 115 Mich. 441; see also Albertson *v.* Wallace, 81 N. C. 479; Sinclair *v.* State, 69 N. C. 47.

[2] Sayre Borough *v.* Phillips, 148 Pa. 482. See Radebaugh *v.* Village of Plain City, 28 Weekly Law Bul. 107; Ex parte Thornton, 12 Fed. Rep. 538.

[3] In re Bliss, 63 N. H. 135.

[4] Coe *v.* Simmons, 3 Pa. Dist. Ct. 792.

sales of products grown by the sellers on their own lands, were held discriminating and void.[1]

A license fee exacted from peddlers, except those dealing exclusively with merchants of the county, merchants residing and having a regular place of business therein and citizens of the county selling wares of their own growth and manufacture, was held void.[2]

§ 134. Discrimination against products of another State invalid.

The leading authority on this subject is the decision of the Supreme Court in Welton *v.* Missouri,[3] decided in 1875, reversing the Supreme Court of Missouri and holding void a statute of that State which, from the requirement of a license from peddlers, excepted goods which were the growth, produce or manufacture of the State. The State court had held that this was valid as a police regulation. But the Supreme Court said that the statute infringed the power of Congress to regulate commerce, which includes the power to determine how far commerce shall be free and untrammeled. In this case the court announced distinctly the doctrine, that that portion of commerce with foreign nations and between the States, which consists in the transportation and exchange of commodities, is of national importance and admits and requires uniformity of regulation.

§ 135. Supreme Court in Welton v. Missouri.

It said, at page 280: "The very object of investing this power in the general government was to insure this uniformity against discriminating State legislation. The

[1] City of Buffalo *v.* Reavey, 55 N. Y. S. 792; see also Fecheimer *v.* City of Louisville, 84 Ky. 306.

[2] Commonwealth *v.* Snyder, 182 Pa. St. 630.

[3] 91 U. S. 275, reversing Missouri *v.* Welton, 55 Mo. 288.

depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question." There is a difficulty, the opinion continued, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the State begins, and a similar difficulty was found in Brown *v.* Maryland in drawing the line of distinction between restrictions upon the power of the States to lay duties on imports, and their acknowledged power to tax persons and property. The court added, at page 282:—

"Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment, unconstitutional and void."[1]

This principle has been frequently enforced. Thus a statute of Virginia discriminating against manufacturers of

[1] The Supreme Court of Missouri, in a decision of an earlier date however was among the first, if it was not the first, of the State courts to condemn discriminations of this character in taxation. Thus in State *v.* North, 27 Mo. 464, in an opinion by Judge Scott, notable from the fact that it was pronounced shortly before the outbreak of the Civil War, when sectional feeling ran high in Missouri, it was said, l. c. p. 482: "Nothing is to be gained by the exercise of the power of laying a discriminating tax. If it is lawful for one State to do it, it is equally so to the others. Laws will be passed in retaliation of those we may

other States, by requiring a license from their agents and not from the agents of its own manufacturers, was held invalid.[1] The court said at page 350: —

"Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, of their having been manufactured without the State, it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character a State can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product."[2]

enact, and so we may be losers in the end. Situated as the State of Missouri is, she should be one of the last to enter on such a course of legislation. Without a seaboard, far in the interior, cut off from all outlet to foreign commerce, she would be one of the greatest sufferers in a contest of such a nature. If we have erred in applying to the law under consideration the principle that a tax discriminating between foreign and domestic articles cannot be imposed, we feel confident, nevertheless, that the principle is a correct one. No one can rise from reading the history of events out of which our present constitution had its existence, without a conviction that the power of laying a discriminating tax on the importations from other States and nations was never designed to be left with the several States. That is a power only to be exercised by a single body, and that body has been created with ample power for the protection of the interests of all the States." This case was cited by the Supreme Court in Ward *v.* Md., *supra*, § 132.

[1] Webber *v.* Virginia, 103 U. S. 344

[2] For decisions in State courts holding discriminations in peddlers' licenses against goods manufactured in other States to be void, following Welton *v.* Missouri, see Vines *v.* State, 67 Ala. 73; Ex parte Thomas, 71 Cal. 204; State *v.* Furbush, 72 Me. 493; State *v.* McGinnis, 37 Ark. 362; Sayre Borough *v.* Phillips, 148 Pa. 482; Georgia Pkg. Co. *v.* Macon,

§ 136. What constitutes discrimination.

Discrimination may consist not only in a different rate of taxation or license as between domestic goods and goods from other States, but also in the requirement of a license for selling those which are foreign made when none is required for selling domestic goods, as in the cases cited, or also a license may be granted only in the case of domestic goods or residents.[1] Freedom of commerce under the guaranty of the Constitution requires equality of right and the absence of all discrimination. Thus, in a Pennsylvania case,[2] an ordinance requiring peddlers and canvassers to take out licenses was held invalid, notwithstanding a proviso that it should not apply to persons soliciting orders for goods manufactured outside the State. The court said there were many articles of interstate commerce, such as the products of the soil, besides manufactured goods. But a requirement of all persons, without discrimination, who desire to peddle a certain commodity, that they must make proof of good moral character before they can obtain a license, is a proper regulation, and not in violation of the interstate commerce clause.[3]

§ 137. Discrimination must relate to interstate commerce.

Thus a city ordinance imposing a license tax upon beer not made in the city but brought there for sale was held

60 Fed. R. 774; Ames *v.* People, 25 Colo. 508. But held in State *v.* Stevenson, 109 N. C. 730, that the exception of "farm products purchased from the producer" from the return required to be made by merchants and other dealers as the basis for a license tax is not a discrimination against the products of citizens of other States.

[1] See In re Bliss, 63 N. H. 135, *supra*, § 133.

[2] Port Clinton Borough *v.* Shafer, 5 Pa. Dist. Ct. 583.

[3] Commonwealth *v.* Harmel, 166 Pa. 89. An illustrative discrimination was held invalid in Iowa, where a city ordinance required a license from peddlers, except where they resided, and the goods were manufactured, in Marshall County. Marshalltown *v.* Blum, 58 Iowa, 184.

by the Supreme Court not open to objection, so far as it operated upon the business of the plaintiff in error, either under the commerce clause or as a violation of the privileges and immunities of citizens, because it did not appear that plaintiff's beer was not manufactured in the State of Virginia and for aught that appeared in the case it might have been manufactured in other parts of that State. In order to raise a Federal question on either ground, it must be shown that the manufacturer is in another State or in a foreign country. The writ of error therefore was dismissed.[1]

§ 138. Taxation of commercial travelers from other States invalid.

The decisions of the Supreme Court denying the right to discriminate against either persons or products of other States were in accord with the prevailing judicial opinion in the State courts. But very many of the States had enacted statutes requiring licenses from *commercial travelers*, sometimes on behalf of both the State and those of its municipalities, which such commercial travelers visited. It was held by the State courts that such statutes, when free from discrimination either against the person employing the drummers or the States wherein the goods sold by them were produced, were not open to the constitutional objection of interfering with interstate commerce. These statutes however were nullified and these decisions overruled by the decision of the Supreme Court in Robbins *v.* Shelby County Taxing District, decided in 1886,[2] which laid down the definite rule ever since consistently adhered to in the court, that while the State can tax property from other States as part of the general property within its jurisdic-

[1] Downham *v.* Alexandria (Va.), 10 Wall. 173.

[2] 120 U. S. 489.

tion, whether in the original packages or not, it cannot tax the business of importing from other States; and, as the right to bring goods from other States includes the right to sell them and to solicit sales, therefore the State cannot tax either the right to sell or the right to solicit sales, whether in the form of a license charge or otherwise.

§ 139. Supreme Court in Robbins v. Shelby County Taxing District.

Robbins, a commercial traveler for a Cincinnati firm, for refusing to pay the license required from all drummers and all persons not having a licensed house of business in the taxing district, who should sell or offer to sell goods, wares or merchandise by sample, was found guilty of a misdemeanor, and the conviction was sustained by the State court. But the Supreme Court held that the statute was invalid as an attempted regulation of commerce, and said, by Justice Bradley, l. c. page 494: —

"In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

"In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundations of interstate trade? How is a manufacturer, or a merchant of one State, to sell his

goods in another State, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done in regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them." * * *

"The truth is, that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale whether by word of mouth only, or by the exhibition of samples. If the right exists, any New York or Chicago merchant visiting New Orleans or Jacksonville, for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts." * * *

§ 140. Interstate commerce cannot be taxed at all.

After denying that the exemption of interstate commerce would in any perceptible degree diminish the resources or just power of taxation of the State, the court proceeded at page 497:—

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers — those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of the State Freight Tax, 15 Wall. 232. The negotiation of the sale of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods in London or New York, because, in the one case it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone."

The court added that it would not be difficult to show this tax to be discriminative against the merchants and manufacturers of other States; and that, if selling goods by sample and the employment of drummers injuriously affected the local interest, Congress, if applied to, would undoubtedly make such reasonable regulations as the case demanded, but Congress alone could do so; "for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different States. The confusion into which the commerce of the country would be thrown by being subject to State legislation on this subject,

would be but a repetition of the disorder which prevailed under the Articles of Confederation." [1]

§ 141. Robbins v. Shelby Taxing District reaffirmed.

Subsequently, in a case from Texas also imposing a tax upon commercial travelers, the court was asked to reconsider the Robbins case. It had been contended by the Texas court, in its opinion, that the decision was contrary to sound principles of constitutional construction and in conflict with the cases formerly decided by the Supreme Court. But the latter tribunal adhered to its ruling, saying: [2] —

"Even if it were true that the decision referred to was not in harmony with some of the previous decisions, we had supposed that a later decision in conflict with prior decisions had the effect to overrule them, whether mentioned and commented on or not. And as to the constitutional principles involved, our views were quite fully and carefully, if not clearly and satisfactorily, expressed in the Robbins case."

§ 142. Supreme Court in Brennan v. Titusville.

The principle of the Robbins case was again applied in the case of the agent of a Chicago manufacturer, who

[1] Chief Justice Waite and Justices Field and Gray dissented, saying that they could see no constitutional objection to such a tax; that there was no discrimination and citizens of other States were taxed the same as if they were citizens of Tennessee. The State court had decided that any person who should sell by sample should pay the tax, and to that they agreed, and that it would be time enough to consider whether a non-resident can be taxed for merely soliciting orders without having samples, when such a case arose. In a later case, Corson *v.* Maryland, 120 U. S. 502, these dissenting judges concurred in the decision on the ground that the statute required the non-resident merchant desiring to sell by sample to pay for his license a sum to be ascertained by the amount of his stock in trade in the State where he resided and where he had his principal place of business; that is, the charge was measured by his capacity to do business all over the United States and without reference to the amount of the business done in Maryland.

[2] Asher *v.* Texas, 128 U. S. 129.

traveled and solicited orders for picture frames, exhibiting samples. He was convicted under an ordinance of the city of Titusville, Pennsylvania, for violating the city ordinance requiring a license from all persons canvassing and soliciting orders for goods, wares and merchandise. The Supreme Court of Pennsylvania sustained the tax, but was reversed by the Supreme Court of the United States. The latter court said it was immaterial that the tax was only required for selling to persons other than manufacturers and licensed merchants, because, if the State could tax for the privilege of selling to one class, it could for selling to another or to all. In either case it was a restriction on the right to sell and on lawful commerce between the citizens of two States. The court was not precluded by the opinion of the Supreme Court of Pennsylvania, that the ordinance was enacted in the exercise of the police power.[1]

In this case the court distinguished Ficklen *v.* Shelby County, *infra*, § 143, saying, l. c. p. 308: —

"We only refer thus at length to that case to show the distinction between it and this case, and to notice that in the opinion was reaffirmed the proposition that no State can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on."[2]

[1] Brennan *v.* Titusville, 153 U. S. 289.

[2] The effect of the decision in Robbins *v.* Shelby Taxing District, was to nullify the laws requiring licenses from drummers in a number of States. The decision was followed in the following State and United States Circuit Courts: *Alabama:* State *v.* Agee, 83 Ala. 110; Ex parte Murray, 93 Ala. 78; *Arkansas:* In re Rozelle, 57 Fed. Rep. 155; *District of Columbia:* In re Hennick, 5 Mackey, 489; *Georgia:* Wrought Iron Range Co. *v.* Johnson, 84 Ga. 754, the Georgia Supreme Court saying: "After the State has yielded to the Federal army, it can very well afford to yield to the Federal judiciary;" *Illinois:* City of Bloomington *v.* Bourland, 137

§ 143. Taxation of commercial brokers.

The taxing power of the State over persons and subjects within its jurisdiction is not limited, except where it involves necessarily and directly the taxation of interstate commerce, that is, taxation of sales or soliciting sales, on behalf of a non-resident principal.

Thus in another Tennessee case,[1] the tax was levied upon commission merchants, who were known as commercial agents and merchandise brokers. They had no capital in their business and so, in accordance with the State statutes, took out a license for one year authorizing them to do any and all kinds of commission business. The tax was imposed on the gross yearly commissions during the year for which they were thus licensed. It happened that during the year 1887 all the sales negotiated by one of the parties, and most of those made by the other, were for non-resident principals. But it seems that their business was not confined to transactions for non-residents. A renewal of their licenses having been applied for, the application was denied because they made no return of sales and no payment of percentage on their commissions received. Thereupon a bill was filed to restrain any interference with their current business. The court affirmed the judgment of the Supreme

Ill. 534; *Indiana:* Martin *v.* Rosedale, 130 Ind. 108; *Kansas:* Ft. Scott *v.* Pelton, 39 Kans. 764; *Louisiana:* Simmons Hardware Co. *v.* Maguire, Sheriff, 39 La. Ann. 848; *Michigan:* People *v.* Bunker, 87 N. W. Rep. 90; *Minnesota:* In re Kimmel, 41 Fed. Rep. 775; *Mississippi:* Overton *v.* Vicksburg, 70 Miss. 558; *Nevada:* Ex parte Rosenblatt, 19 Nev. 439; *North Carolina:* Ex parte Hough, 69 Fed. Rep. 330; also State *v.* Bracco, 103 N. C. 349; *Oklahoma:* Baxter *v.* Thomas, 4 Okla. 605; *Pennsylvania:* In re White, 43 Fed. Rep. 913; In re Nichols, 48 Fed. Rep. 164; In re Tyeman, 48 Fed. Rep. 167; *Texas:* Ex parte Stockton, 33 Fed. Rep. 95; Talbutt *v.* State, 39 Tex. Crim. Rep. 64; *Virginia:* Adkins *v.* Richmond, 98 Va. 91, and 47 L. R. A. 583. In Texas the State court at first declined to follow the Robbins case, see In re Asher, 23 Tex. App. 662, reversed in 128 U. S. 129, *supra*, § 141.

[1] Ficklen *v.* Shelby County Taxing District, 145 U. S. 1.

Court of Tennessee denying the injunction, saying that the tax was not on the goods, nor on the proceeds of the goods, nor was it a tax on non-resident merchants, and that if it affected interstate commerce in any way, it was incidentally and so remotely as not to be a regulation of such commerce.[1]

§ 141. Supreme Court in Ficklen v. Shelby County Taxing District.

"No doubt can be entertained," said C. J. Fuller, who delivered the opinion, at page 21, "of the right of a State legislature to tax trades, professions and occupations, in the absence of inhibition in the State constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution." * * *

And he concluded as follows, p. 24: —

"We agree with the Supreme Court of the State that the complainants have taken out licenses under the law in question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities

[1] See also State *v.* Wagener, 77 Minn. 483, where a statute requiring commission merchants selling agricultural produce on commission to take out a license and give bond for benefit of consignors was sustained, the court saying that the statute was obviously not intended to raise revenue, but to protect consignors of wheat and perishable farm produce from frauds so frequently practiced upon them. It was therefore an ordinary police regulation. See *infra*, § 153.

refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record."

Justice Harlan dissented, concluding as follows, p. 28: —

"The result of the present decision is that while, under Robbins *v.* Shelby County Taxing District, a license tax may not be imposed in Tennessee upon drummers for soliciting there the sale of goods to be brought from other States; while, under Leloup *v.* Mobile, a local license tax cannot be imposed in respect to telegrams between points in different States; and while, under Stoutenburgh *v.* Hennick, commercial agents cannot be taxed in the District of Columbia for soliciting there the sale of goods to be brought into the District from one of the States, — the Taxing District of Shelby County may require, as a condition of granting a license as merchandise broker, that the applicant shall pay a license fee and, in addition, 2½ per cent upon the gross commissions received, not only in the business transacted by him that is wholly domestic, but in that which is wholly interstate."

It seems that in this case the complainants held themselves out as prepared to transact business upon commission for whoever employed them, whether resident or non-resident, and their claim of exemption rested upon the single fact that during that year their principals were non-residents. The case was distinguished from the Robbins case on the ground that there the tax was not upon Robbins, but upon the non-residents who employed him, while here the tax was upon the merchandise brokers themselves in respect to the general commission business which they conducted.

It will be noted that in Brennan *v.* Titusville, above referred to, the court referred to this case and said that it was no departure from the rule so firmly established by the prior decisions, at page 308: "At least, no departure was intended, though, as shown by the division in the court, and by the dissenting opinion of Mr. Justice Harlan, the case was near the boundary line of the State's power. In that case the plaintiffs were in a general commission business, not acting for any particular firm within or without the State."

§ 145. Stockard v. Morgan on commercial brokers.

In a very recent case, also from Tennessee, the Supreme Court reversed the judgment of the Supreme Court of that State, and held that parties who do business only for non-residents, that is, whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers in the State as agents for non-resident parties, firms or corporations, are not subject to a privilege tax for conducting such business.[1] The fact that a broker, as such, can transact a local business as well as a business for non-residents, does not determine the matter, and, if he confines himself to interstate business, he can do so without becoming liable to the tax.[2] The court said at page 580: —

"Although it is said in the opinion of the State court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon interstate

[1] Stockard *v.* Morgan, 185 U. S. 27; decided April 7, 1902.

[2] Following and quoting from Stratford *v.* Montgomery, 110 Ala. 619.

commerce, and that fact is not in any wise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce, under whatever name it may be designated.''

It therefore is established by this latest judgment of the court that commercial agents or brokers who transact business exclusively for non-residents, in soliciting purchases or sales, are not subject to a privilege or occupation tax for so doing.

§ 146. The form of commercial agency immaterial.

It is immaterial therefore whether the agency in conducting interstate commerce is that of a drummer soliciting sales, or of a commercial broker negotiating purchases. The essential fact is that it is interstate commerce, that is, the sale of property out of the State to a resident of the State, or of property in the State to a non-resident. It is immaterial whether the agent is a commercial traveler, or has an office as a commercial broker. He may neither travel nor have an office, but have a room at his hotel, or at his lodgings, in which he exhibits his samples or negotiates purchases. In the case of brokerage however it seems that exemption from taxation may be claimed only when the business is *exclusively* for non-residents.[1]

Delivery is essential to a sale. The agent delivering goods sold by a drummer or commercial traveler is therefore also exempt from State taxation. Thus the salaried distributing agent for a publishing firm of another State is entitled to distribute the books sold through another salaried agent,

[1] See cases *supra*, § 143 *et seq.*, and Walton *v.* Augusta, 104 Ga. 757, 30 S. E. Rep. 964, where parties engaged in the commercial street-brokerage business were held not exempt from a municipal tax.

and a license cannot be exacted without an unlawful interference with interstate commerce.[1] It is immaterial that the goods are to be sold on the installment plan. The right to sell implies the obligation and right to deliver.[2]

§ 147. Only interstate commerce agencies exempt.

To secure exemption from the taxing power of the State over persons and subjects within its jurisdiction, it must appear that the business for non-residents is interstate commerce.

While interstate commerce is more than travel, and in its broad sense includes intercourse and the means of intercourse, it has been held not to include personal interstate contracts, like insurance, but to be limited to subjects of trade and barter offered in the market and having an existence and value independent of the parties to the contract.[3]

Thus neither the contract of fire insurance,[4] nor of marine insurance,[5] nor of mutual life insurance [6] constitute commerce. The making of such contracts, it was said, is a mere incident of commercial intercourse, and not commerce itself.

This distinction was illustrated in two cases from Tennessee. The soliciting of pictures to be enlarged outside of the State was held to constitute interstate commerce,[7] because the process of enlarging involved the making of a larger picture from the image of a smaller one, and hence there was traffic or commerce. But the business of collect-

[1] Huntington *v.* Mahan, 142 Ind. 695.

[2] In re Spain, 47 Fed. Rep. 208. See also Laurens *v.* Elmore, 55 S. C. 477, 33 S. E. Rep. 560; Pegues *v.* Ray (La.), 23 So. Rep. 904.

[3] Paul *v.* Virginia, 8 Wall. 183.

[4] Paul *v.* Virginia, *supra.*

[5] Hooper *v.* California, 155 U. S. 648.

[6] N. Y. Life Ins. Co. *v.* Cravens, 178 U. S. 389.

[7] Tennessee *v.* Scott, 98 Tenn. 254, and 36 L. R. A. 461.

ing soiled linen in Tennessee for shipment to a Kentucky laundry to be washed and then returned was not interstate commerce.[1] The court said, in the latter case, that there was no commodity created of which the ownership was changed. It was simply a personal contract having no element of a commercial transaction.

On the other hand, the selling of cloth by sample to be made up in another State from measurements taken by the salesman, and the clothing returned to the purchaser, was a transaction of interstate commerce.[2]

§ 148. The sale of goods in the State subject to the taxing power of the State.

It has been held that the principle of exemption has no application when the goods sold by the commercial traveler or other solicitor are actually in the State when sold, as such a sale is not a transaction in interstate commerce. Accordingly when a salesman takes the goods about with him and delivers them when sold, a license may be required from him. See taxation of peddlers, *infra*, § 150.[3] Thus where a corporation of one State sends its manufactured goods into another in car load lots, and causes the goods to be stored in a storehouse, from which its agents take them in small quantities, carry them about the country, and sell and deliver them to purchasers, such agents are not engaged in interstate commerce.[4] In other words, when the goods are sent into the State unsold and are there stored for sale, they become part of the general property of the State and amenable to its laws.[5] Thus, in the case

[1] Smith *v.* Jackson, 54 S. W. Rep. 981, and 47 L. R. A. 416.

[2] State *v.* Rankin, 76 N. W. Rep. 299, 11 So. Dak. 144.

[3] South Bend *v.* Martin, 142 Ind. 31; State *v.* French, 109 N. C. 722.

[4] American Harrow Co. *v.* Shaffer, 68 Fed. Rep. 750.

[5] Hynes *v.* Briggs, 41 Fed. Rep. 468; Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 35 L. R. A. 497.

last cited, it was said by the court, Caldwell, J., that while the State could not license the selling by sample of goods which were not in the State, it could tax the privilege of selling them after they had been shipped into its jurisdiction and stored in a storehouse, in this case a railroad depot rented for the purpose. The property then can be taxed as other property in the State. It is immaterial that the goods in the State are in the original packages, provided of course they are not imported foreign goods.[1]

It is immaterial that the goods sent into the State on orders forwarded by the drummer are packed in a box and consigned to him for distribution therefrom. The opening of the box in such case does not cause the property to become mingled with the property of the State for taxation.[2]

Whether such goods thus sent into the State and there stored for the purposes of sale are taxable or not, of course depends upon the laws of the State. It has power to tax them, because they are within its jurisdiction, and it also has power to tax the business of selling them. It has been held however that such sending of goods into a State by a foreign corporation does not constitute "doing business" within the State. See *infra*, § 175.[3]

[1] In re May, 82 Fed. Rep. 422, 432, and see cases cited *supra*, § 109 *et seq.* See also In re Nichols, 48 Fed. Rep. 164, where the ordinance imposing a license was held void in the case of a book agent, although the books sold by him were delivered from a stock in a branch office or storeroom in Pittsburgh, replenished from time to time by the publisher. The point here involved, as to the effect of this renting of a storeroom, was not discussed in the opinion.

[2] In re Spain, 47 Fed. Rep. 208.

[3] The distinction between the taxing power of the State over property within its jurisdiction and the actual exercise of that power is illustrated in People ex rel. Mills *v.* Commissioners of Taxes of New York, 23 N. Y. 242, where it was held that manufactured goods, owned by non-residents and sent into New York for mere purposes of sale without reinvestment of the proceeds, were not taxable under the provisions of the New York statute.

A party sells goods as owner, not as agent, and is accordingly subject to a license tax, where, after obtaining orders therefor from resident customers for a non-resident concern, he submits these orders, and, having obtained the goods, which are charged to him individually and shipped directly to him in bulk, he delivers the goods to the several customers and collects the price.[1] The distinction is between the sales made by a party as agent for a non-resident principal and sales made by a party for himself on his own account.

§ 149. Discrimination must be more than an incidental disadvantage.

To constitute discrimination in taxation against a non-resident manufacturer or dealer, there must be more than a mere incidental disadvantage, not growing out of any intention on the part of the legislature to make a hostile distinction. The act must show an intention to discriminate. Thus, in a recent case,[2] a tax levied by the State of Ohio upon every person, corporation or partnership carrying on the business of trafficking in spirituous, vinous or intoxicating liquors was adjudged valid, and the bill filed by a brewing company of West Virginia to enjoin a county treasurer from enforcing a collection of this tax levied on beer shipped to the company's Ohio agent and stored for delivery in its cold storage house, was held properly dismissed. There was no illegal discrimination in the exemption of liquors sold upon prescriptions issued in good faith by physicians, or exclusively for chemical, pharmaceutical or sacramental purposes; nor in the fact that the sale of liquor at the manufactory by the manufacturer in quantities of one gallon or more at one time, was

[1] Kimmell *v.* State, 104 Tenn. 184; see also Croy *v.* Obion County, 104 Tenn. 525.

[2] Reymann Brewing Co. *v.* Brister, 179 U. S. 445.

not subject to the tax. The plaintiff claimed that the latter provision operated as an illegal discrimination against him, because he must necessarily sell at places other than his manufactory. The court however replied, that manufacturers both within and without the State could sell at the manufactory and ship to any part of Ohio, and the incidental disadvantage that the foreign manufacturer was under, if he wished to establish in Ohio a place for making sales, did not appear to arise out of any intention on the part of the legislature to make a hostile discrimination against foreign manufacturers. The tax in this case was not an interference with interstate commerce, but a legitimate exercise of the police power of the State under the Wilson Act.[1]

A revenue act requiring all merchants to pay as a license fee a certain per cent on the total amount purchased in or out of the State, except purchases of farm products from the producer, for cash or on credit, was not a tax on the privilege of purchasing the goods, but on the goods themselves as part of the general mass of property in the State, and such a tax did not therefore in its application to purchases outside of the State, operate as an interference with interstate commerce.[2] Nor did the fact that merchants would probably buy more products from resident than non-resident farmers constitute such interference.

§ 150. A tax upon peddlers without discrimination against residents or products of other States is valid.

The taxation of peddlers however, without discrimination in favor of either the residents or the products of the State, is valid. This was the ruling of the State courts

[1] See *supra*, § 124.

[2] Ex parte Brown, 48 Fed. Rep (N. C.) 435.

before the Supreme Court decided the question.[1] Thus, in the case cited, decided in 1853, it was said by Chief Justice Shaw in answer to the objection that the statute licensing peddlers was an interference with commerce: "We consider this as wholly an internal commerce which the States have a right to regulate, and in this respect this law stands on the same footing with the laws regulating sales of wine and spirits, sales at auction, and very many others, which are in force and constantly acted upon."

The question first came before the Supreme Court in the case of a sewing machine agent in Tennessee, who was held properly convicted for the failure to have a peddler's license, the court saying that the requiring of a license from each peddler without reference to the place of growth or manufacture of his wares, was neither a violation of the constitution nor an attempted regulation of commerce.[2] This ruling was reaffirmed in a later case, where the Missouri statute condemned by the court in the Welton case, which had been re-enacted without the discriminating clause, was construed and approved.[3] The opinion runs as follows, at page 311: —

"The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and were neither interstate

[1] See Commonwealth *v.* Ober (Mass.), 12 Cush. 493.

[2] Machine Co. *v.* Gage, 100 U. S. 676.

[3] Emert *v.* Missouri, 156 U. S. 296. Among State decisions to the same effect are: Wrought Iron Range Co. *v.* Carver, 118 N. C. 328; City of Carrollton *v.* Bazzette, 159 Ill. 284; Cole *v.* Randolph, 31 La. Ann. 535; State *v.* Harrington, 68 Vt. 622; State *v.* Richards, 32 W. Va. 348.

commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State.

"The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other States; and manifests no intention to interfere, in any way, with interstate commerce. Its object, in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect the citizens of the State against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door."

It was argued in this case on behalf of the company owning the sewing machines which the peddler was selling, that it had forwarded its machines from its works in another State as "a matter of interstate commerce" to its agent, to be sold by him on its account, and that the exaction of a license from Emert was in effect a regulation of commerce; but the court held that peddling was not interstate commerce.

§ 151. Definition of a peddler.

The court in this case adopts the definition of a peddler given by Justice Shaw in Commonwealth *v.* Ober, *supra*, § 150, as follows: —

"The leading primary idea of a hawker and peddler is that of an itinerant traveling trader, who carries goods

about, in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this (though perhaps not essential), by a hawker is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale, by an actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish."

The peddler is therefore an itinerant trader, one who sells and delivers wares, usually small, from house to house. It is not necessary that he should be personally interested in the sales. He may be paid for his services by salary or otherwise.

It was held in the District of Columbia that an agent may be compelled to take out a peddler's license who sells goods at retail from house to house and delivers them at the time of the sale, as an advertisement for a wholesaler who employs him.[1]

In a Virginia case it was said that a peddler is a person who does not keep a regular place of business, either in a house, vacant lot or elsewhere, open at all times in regular business hours, and who offers wares for sale.

§ 152. Peddlers and drummers.

As a State or municipal license may be required of a peddler, but not of a drummer, the question has been raised in several cases as to when a party is the one or the other.[2]

[1] In re Wilson (D. C.), 12 L. R. A. 625.

[2] Thus, in North Carolina, State *v.* Gorham, 115 N. C. 721, an itinerant who sold and put up lightning rods was held properly required to take out a license. There was no violation of interstate commerce, as there was a distinction between the business of selling lightning rods and

Thus it was held in the United States Circuit Court in Missouri,[1] that a single sale by a drummer who was selling by samples, effected by his delivery of the article that he carried with him as a sample, did not make him a peddler within the meaning of the statute of Missouri requiring a license of peddlers. The court said, l. c. p. 542: "To hold that such sporadic, casual sale fixes upon the party the office of a dealer does not obtain outside of the practice under the revenue laws, which are designedly rigid and controlled by the letter of the act."

But a party is none the less a peddler within the meaning

putting them up, and the State had the right to license the latter, though no extra charge was made therefor.

In State *v.* Caldwell, 127 N. C. 521, the agent of a non-resident portrait company, having made contracts of sale by samples, placed the pictures in the frames in his room at the hotel, and then delivered them to the purchasers. The court decided that this was not interstate commerce, distinguishing the case from Brennan *v.* Titusville on the ground that no title to the pictures passed until they were put into the frames and delivered. Judge Clark dissented, holding that there was no breaking of bulk in the legal sense and that the transaction was in effect a delivery of the article sold by sample.

In Georgia, Racine Iron Co. *v.* McCommons, 111 Ga. 536, the court held that an itinerant selling smoothing irons was none the less a peddler because he took his orders first by sample and then, after the lapse of some period of time, whether a day, week or month, freighted himself with the goods and filled the orders, which he had previously procured by a house-to-house canvass.

Contra: In Wyoming, State *v.* Willingham, 9 Wyo. 290, an itinerant picture agent who not only sold by sample but received and distributed the pictures and frames, was held to be engaged in interstate commerce.

In Indiana, a book agent distributing books previously sold by sample, was held to be engaged in interstate commerce. Huntington *v.* Mahan, 142 Ind. 695.

In Texas, where orders for groceries and medicine were taken by sample and brand, forwarded to a non-resident firm and filled on approval, and the goods were shipped back in boxes consigned to the firm in Texas, where they were unpacked and delivered to the purchasers from the car, it was held that this was interstate commerce. Turner *v.* State, 41 Tex. Crim. Rep. 545. See also Miller *v.* Goodman, 40 S. W. Rep. 718.

[1] In re Houston, 47 Fed. Rep. 539.

of the statute exacting a license from itinerant traveling traders, when he goes from house to house and sells and delivers goods which he carries with him, although he may occasionally sell by sample and forward the order to his non-resident principal. In other words, it is immaterial that he occasionally transacts business in interstate commerce, if he is at the same time a peddler within the meaning of the State statute. Thus, in a case under the same Missouri law, the party went from house to house carrying a single harrow with him, which he sometimes sold and delivered, and then replaced by another from the warehouse where the harrows were stored, but which in other cases he used as a sample and thereafter filled the order. The Supreme Court of the State held that this agent was a peddler. In this case however the harrows were stored in the State, so that the transaction in any event was not one of interstate commerce.[1]

Some of the State courts and United States Circuit Courts, particularly before the decision of the Supreme Court in Emert *v.* Missouri, in sustaining the right to tax peddlers, held that the original packages shipped from other States were still the subjects of interstate commerce until sold, although stored in a warehouse in the State.[2] But, as already shown, see §115, *supra*, the original package in interstate commerce, when stored in the State unsold, is protected against its police power, but not against its taxing power. One State cannot exclude the original package coming from another without the consent of Con-

[1] State *v.* Snoddy, 128 Mo. 523; State *v.* Wessell, 109 N. C. 735; American Harrow Co. *v.* Shaffer, 68 Fed. Rep. 750. See also French *v.* The State, 52 L. R. A. 160, where the court held that the agent of a non-resident organ company carying an organ in a wagon which he sometimes delivered and sometimes used as a sample, sending an order for one to be shipped to the purchaser, was engaged in interstate commerce.

[2] See French *v.* The State, *supra;* Commonwealth *v.* Harmel, 166 Pa. 89.

gress; but when stored within its jurisdiction for the account of the non-resident owner, it is subject to taxation like other property of the State; see authorities *supra*, § 111. The State therefore has the power to tax, not only the property, but also the occupation of selling it. The test of its taxing power is the presence of the property sold within its jurisdiction at the time of the sale.

§ 153. **Licensing under the police power.**

The State can license occupations as well for police regulation, in the interest of public health and morals, as for purposes of revenue. The licensing of itinerant traders has been sustained on both grounds. Thus the Supreme Court said in Emert *v.* Missouri, *supra*, § 150, that the object of the statute in that case under consideration was to protect the citizens against the cheats and frauds, or even thefts, which the experience of ages had shown were likely to attend itinerant and irresponsible peddling from place to place and from door to door.

A statute then, obviously intended, not to raise revenue, but to protect the public, will be sustained, although incidentally it may affect interstate commerce. See note, § 143, *supra*.

Thus, in an Iowa case,[1] a license on itinerant vendors of drugs was held valid, although defendant sold in the original packages, the court saying that the primary object of the act was not to derive revenue for the State, but in large part at least to protect its citizens against solicitations and harmful practices of irresponsible and unknown vendors of drugs, and that the prohibited act could be committed without any sale.

Licenses required of liquor dealers are therefore within

[1] Iowa *v.* Wheelock, 95 Iowa, 577; State *v.* Smithson, 106 Mo. 149. See also Commonwealth *v.* Newhall, 164 Mass. 338.

the legitimate police power of the State. But even such licenses must not discriminate against the citizens or products of other States,[1] nor can there be any interference, without the consent of Congress, with the shipment of original packages into the State. But the requirement of a license, though the issue of it depends upon the permission of a majority of a board and the approval of adjacent property owners, provided there be no discrimination, is not in violation of the Federal Constitution.[2]

§ 154. Police power cannot interfere with interstate commerce.

The police power of the State therefore, whatever may be the subject, must be exercised subject to the national control over commerce. It cannot interfere with this, under the guise of restraining peddling from door to door by irresponsible parties. Thus it was strongly urged in the case of Brennan *v.* Titusville, *supra*, § 142, in the words of the Supreme Court of the State, that if canvassers, hawkers and peddlers coming from other States and infesting the homes of the citizens at all seasons and imposing their worthless goods upon gullible or inexperienced housemaids or housewives, should, under the guise of interstate commerce, be permitted without any restraint whatever to go on deceiving and injuring the public, it would be a startling and unlooked for result of the investment of the general government with the power to regulate commerce. But the Federal Supreme Court answered, page 298, that the license did not purport to be exacted in the exercise of the police, but

[1] Tiernan *v.* Rinker, 102 U. S. 123; Walling *v.* Michigan, 116 U. S. 446 overruling People *v.* Walling, 53 Mich. 264; Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. Rep. 258; see also Pabst Brewing Co. *v.* Terre Haute, 98 Fed. Rep. 330; State *v.* Zophy, 84 N. W. R. 391, 14 S. Dak. 119; Cullman *v.* Arndt, 125 Ala. 581, State *v.* Lichtenstein, 44 W. Va. 99.

[2] In re Christensen, 85 Cal. 208; Hinson *v.* Lott, 8 Wall. 148.

rather of the taxing power, and that it was not designed to protect from imposition or wrong either minors, habitual drunkards, or persons under any other affliction or disability. There was no charge that the goods which defendant was engaged in selling, i. e., pictures and picture frames, were open to any condemnation, and they were in fact unchallenged subjects of commerce. "There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to the health, morals, or general welfare of the community." The court therefore held that the act was not a legitimate exercise of the police power, but was a direct interference with interstate commerce.[1]

§ 155. Supreme Court not concluded by title as to purpose of act.

In determining whether a license is exacted in the legitimate exercise of the police power of the State, the Supreme Court is not concluded, as to the purpose of the act, by either the recital of the purpose or the title. Thus, in Brennan *v.* Titusville, *supra*, § 142, while the court found that the ordinance was declared in the title to be for general revenue purposes, it said that even if that declaration

[1] In Arnold *v.* Yanders, 56 Ohio 417, 47 N. E. Rep. 50, the act of Ohio, making it unlawful to sell or expose for sale within the State *convict made goods* without first obtaining a license of $500 per annum, was held void as interfering with commerce.

The Texas statute imposing an occupation tax of $500 upon every person, firm or association engaged in selling the "Sunday Sun," the "Kansas City Sunday Sun," or other publications of like character, being applicable to all persons, whether residents of the State or not, engaged in selling "publications of like character" with those specifically mentioned, was held not a discrimination against either the person or the property of the owners of the publications named, but a legitimate exercise of the police power, and therefore not invalid as a regulation of interstate commerce. Preston *v.* Finley (C. C.), 72 Fed. Rep. 850.

See also similar statute sustained in 17 Tex. App. 253.

had been reversed and the license had been declared in terms to have been enacted as a police regulation, that would not decide this question, for whatever may be the reason given to justify, or the power invoked to sustain, the act of the State, if that act is one which trenches directly upon that which is exclusively within the jurisdiction of the national government, it cannot be sustained. The Supreme Court however, in this as in other cases, adopts the construction given by the State court to the statute, and then determines whether the statute as thus construed and enforced by the State court is an interference with interstate or foreign commerce. See *supra*, § 62.

§ 156. Is a license act void in part void in toto?

When a discriminating feature of a statute, or a provision laying a tax upon sales by non-residents and thus interfering with commerce, is held void, whether other provisions of the statute, providing for the taxation of residents and parties not engaged in interstate commerce, are void likewise is a matter of construction of the State statute, upon which the judgment of the State court is conclusive, so that no Federal question is raised. The decision obviously depends upon whether it can be assumed that the legislature would have enacted the statute without the discrimination.[1] Thus in the Income Tax Cases the Supreme Court held that the tax upon incomes constituted an entire scheme of taxation, which Congress would not have enacted except as an entirety; and the invalidity of certain provisions was therefore held to invalidate the law.[2]

[1] See State *v.* O'Connor, 5 N. Dak. 629.

[2] *Infra*, Sec. 479.

CHAPTER V.

REGULATION OF COMMERCE, CONTINUED.

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184. Corporation carrying on interstate commerce not exempt from charges for privilege of incorporation.

§ 157. Right of foreign corporations in interstate commerce.

In the protection of interstate commerce against discriminating or interfering State taxation, there is no distinction between non-resident individuals and corporations. Corporations, it is true, are not citizens within the meaning of Article IV., Section 2 of the Constitution, providing that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, though they are persons, as will be seen, within the meaning of the Fourteenth Amendment, and therefore entitled to due process of law and the equal protection of the laws. The right to engage in interstate commerce however does not depend upon citizenship, and the capacity of the foreign corporation to do so must be determined by its own charter as granted by the State of its creation, and by the law of the State in which it is carrying on business. A manufacturing company therefore, incorporated and doing business under the laws of one State, can send its commercial travelers soliciting sales through other States, and may ship its goods to the purchasers or to its agents for delivery to purchasers. In like manner, foreign corporations may employ commercial brokers in different States, and such brokers will be entitled to the same protection in transacting interstate commerce as if they were employed by non-resident individuals. These principles are so well established that it is unnecessary to cite authorities in their support.[1]

[1] Coit *v.* Sutton, 102 Mich. 324, 25 L. R. A. 819, and cases cited in opinion.

§ 158. Foreign corporation does business in State only through comity of State.

It is equally well established that the foreign corporation, unless actually employed in the service of the Federal Government or in furnishing the facilities of interstate commerce, *e. g.*, an interstate carrier, cannot come into a State and "do business" therein without the consent of the State.[1] While the foreign corporation may sell its goods in the State, or solicit sales in the transaction of interstate commerce, as a right, it can only establish itself in the State and do business therein, as a privilege granted by the State. While the State cannot tax the exercise of the right, it can tax the enjoyment of the privilege. As the State has the right to exclude foreign corporations, it necessarily has, involved therein, the right to impose conditions on their admission into its jurisdiction.[2]

§ 159. Right to impose discriminating taxation as condition of admission into State.

As the State has the right to determine the conditions of admission of foreign corporations into the State to do business therein, it has the right to make the grant of this privilege conditional upon the payment of a license tax and to fix the sum in its discretion. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of the corporate powers in the State. The situation is analogous to the grant of a corporate charter by the State, which confers the right to act in a corporate capacity upon such terms, as it deems proper. In like manner, the grant to a foreign corporation of the right to act in a corporate capacity within the State is made upon such terms as the State deems proper to impose.

[1] Bank of Augusta *v.* Earle, 13 Peters, 519; Lafayette Ins. Co. *v.* French, 18 How. 451, 452.

[2] Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28.

§ 160. **Foreign insurance companies.**

This principle was illustrated in a case from Illinois, where the Supreme Court held valid a license tax exacted from foreign insurance companies of two dollars upon every one hundred dollars of premium collected in Illinois.[1] This sum was charged as the amount of the license to be paid as a condition of doing business in the State. The court quoted one of its former decisions[2] to the effect that a foreign insurance company has no right to do business in the State without the State's consent, and that the business of insurance is not interstate commerce, and concluded: "as to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."

§ 161. **Same principle extended to foreign insurance associations.**

The same ruling was extended by the court to an English association organized under what was known as a "deed of settlement," legalized and enlarged by the acts of Parliament, which had many of the attributes generally found in corporations for pecuniary profit. It had a distinctive name and, under the statute, could sue and be sued in the name of one of its officers, though it had no common seal. The State of Massachusetts enacted a statute imposing a tax of four per cent upon all premiums collected by a foreign insurance company, two per cent upon those of companies incorporated under the laws of another State of the United States, only one per cent upon those of a Massachusetts company, and no tax at all where the business of insurance was transacted by natural persons, citizens

[1] Ducat *v.* Chicago, 10 Wall. 410.
[2] Paul *v.* Virginia, 8 Wall. 168.

of Massachusetts. It was argued that this association was not a corporation, but a body of natural persons. But the court held, affirming the Supreme Court of Massachusetts,[1] that, as the law of corporations is understood in this country, the association was a corporation, and that the court could pay no attention to the local policy of England in determining whether an association was an incorporated body. The court therefore said that the company could not exercise its functions in the State of Massachusetts without the payment of this specific tax as a condition, and that the imposition of such a tax, discriminating as it was, was no violation of the Federal Constitution or of any treaty protected by it.

§ 162. Foreign corporations not admitted into State under United States treaty.

As the right of the State to determine who shall act in a corporate capacity within its limits is an attribute of its sovereignty, subject only to the control of the Constitution of the United States, it follows that a corporation organized in a foreign country, having its principal place of business there, can derive no right to do business in the State through treaty stipulations between the United States and that country. Thus it was held that a corporation organized in England was not a subject of that country within the meaning of the treaty giving its subjects the right to do business in any State of the Union on the same terms as natives.[2]

[1] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566. Justice Bradley concurred in the result, but thought the company was a special partnership or joint-stock company, which came nevertheless within the scope of the Massachusetts statute. See also Southern B. & L. Assn. *v.* Norman, 98 Ky. 294.

[2] Scottish Union Ins. Co. *v.* Herriott, 109 Iowa, 606. See also Liverpool Ins. Co. *v.* Massachusetts, *supra*, § 161.

§ 163. State has power to change conditions of admission of foreign corporations.

As the State has power to exclude entirely, it has power also to change the conditions of admission of foreign corporations at any time for the future, and to impose as a condition the payment of a new tax or the payment of a further tax as a license fee. When it requires such license fee as a prerequisite, for the future, the foreign corporation, until it pays it, is not admitted within the State. "It is outside, at the threshold, seeking admission, with consent not yet given." It is immaterial what is the occasion of the change. This was the decision of the Supreme Court[1] in a case from New York, where a change in the amount of the annual license was complained of, which effected a discrimination as between corporations coming from one State and those of the same class coming from others.

§ 164. Retaliatory legislation in condition for admission.

In the last cited case, the change in the conditions of admission was effected through what is known as retaliatory legislation, that is, the statute provided that, whenever the laws of any other State should require from a New York insurance company a greater license fee than the laws of New York should then require of all insurance companies of such other State, all such companies of such other State should pay in New York a license fee equal to that imposed by such other State on New York companies. This act was contested in the State court on the ground

[1] Philadelphia Fire Association *v.* New York, 119 U. S. 110, p. 119. Justice Harlan dissented, saying that Pennsylvania corporations could not be subjected to higher taxes in N. Y. than are imposed there upon corporations of the same class from other States; that this was a violation of the equality required by the Fourteenth Amendment. See *infra*, "Equal Protection of the Laws," Chapter XV.

that it was an unlawful delegation of legislative power. But the court held that the act of legislation was complete, and that it was competent to make the increase take effect in a given contingency.[1] Such provisions exist in the statutes of many of the States, and have been almost uniformly sustained.[2]

In the Kansas case just cited it was said in the opinion by Judge Brewer, afterwards Justice Brewer of the Supreme Court, that such a provision is more properly to be deemed one for reciprocity than for retaliation, and that it is no violation of the provision of the State constitution for equality in taxation, as the classification of foreign corporations by States is a reasonable and proper one.

The Supreme Court in Philadelphia Fire Assn. *v.* New York, *supra*, § 163, only discussed the Federal question, as the case was brought before it on writ of error to the highest court of the State, and the decision was put upon the single ground that the change in the conditions of admission was within the power of the State. It was said in the State court, on the claim that the conditions violated the Fourteenth Amendment, that "until they (the foreign corporations) are within our jurisdiction, the final clause of article 14, by its own terms, does not apply. While they stand at the door bargaining for the right to come in they may decline to come, but cannot question our conditions if they do."[3]

§ 165. Pembina Mining Company v. Pennsylvania.[4]

The power of the State was forcibly illustrated in the case of the Pembina Mining Company *v.* Pennsylvania,

[1] People *v.* Fire Association, 92 N. Y. 311; see also *infra*, § 174.

[2] Phoenix Ins. Co. *v.* Welch, 29 Kansas 672; Home Ins. Co. *v.* Swigert, 104 Ill. 653; State ex rel. *v.* Insurance Co., 115 Ind. 257. But see *contra*, Clark *v* Mobile, 67 Ala. 217.

[3] 92 N. Y. p. 327.

[4] 125 U. S. 181.

where plaintiff was a Colorado company having its principal office in its home State, but having another in Philadelphia for the use of its officers. Pennsylvania assessed against the corporation for an office license a tax which amounted to $250, one-quarter of a mill on each dollar of its million dollars of capital stock. The Supreme Court, affirming the Supreme Court of Pennsylvania, held that the tax was valid, and said at page 186: —

"The recognition of its (the corporation's) existence in Pennsylvania, even to the limited extent of allowing it to have an office with its limits for the use of its officers, stockholders, agents and employees, was a matter dependent on the will of the State. It could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State."

§ 166. **Horn Silver Mining Company v. New York.**

A New York statute provided that every corporation, domestic and foreign, should be subject to a tax upon its corporate franchises or business, to be computed by a certain percentage of its capital stock, measured by the dividend on the par value of that stock, or where there were no dividends or its dividends were less than a certain percentage upon the par value of the capital stock, then according to a certain percentage upon the actual value of the capital stock. A Utah corporation had a capital stock of ten million dollars and the tax assessed thereon was thirty thousand dollars, which however it refused to pay, claiming that the tax was illegal. The evidence showed that it paid taxes both in Utah and in the State of Illinois, and that the greater part of its business, as well as the greater part of the capital used in its business, was out of

the State of New York. But the Supreme Court sustained the tax,[1] saying, l. c. p. 313: —

"The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. As to a foreign corporation — and all corporations in States other than the State of their creation are deemed to be foreign corporations — it can claim a right to do business in another State to any extent, only subject to the conditions imposed by its laws."

§ 167. Right to discriminate against foreign corporations.

It is not essential that the State should impose the same tax as a condition for a foreign corporation to act in a corporate capacity in the State that it charges its own citizens for organizing under its own laws and acting in a corporate

[1] Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

capacity. In the sense that it has the right to determine what shall be paid in each case for the privilege of acting in a corporate capacity, it has the right to discriminate. Therefore the State can make the admission of a foreign corporation dependent upon the payment of a specific license tax, or of a sum proportionate to the amount of its capital, and it is not necessary that this tax should be specifically entitled a license. Thus, in the case last cited, the court said at page 315: —

"The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the State. Conceding such to be the case we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the State, and in doing such business it puts itself under the law of the State, however that may be characterized."

§ 168. Discrimination limited to imposition of conditions for admission.

It was said in the same opinion, that neither an individual member of a foreign corporation, nor the corporation itself can call in question the validity of any exaction which the State may require for the grant of its privileges. This obviously refers to the tax imposed for the privilege of acting in a corporate capacity in the State. It does not mean that, after the corporation has been admitted into the State and paid the charge exacted for admission, it is not entitled to due process of law, or the equal benefit of the laws under the Federal Constitution, or equality and uniformity of taxation under the State government. The situation is therefore analogous to that of a domestic corporation. The State may impose such exaction as it pleases as a condition for granting the corporate franchise, but

when the corporation is organized, its property is to be taxed as other property, subject to such classification and specification as may lawfully be made.

§ 169. Distinction however academic rather than practical.

So far as the taxing power of the State is concerned with reference to foreign corporations admitted through its consent, the limitation of the power to discriminate in taxation to the imposing of conditions for admission is academic rather than practical, for the reason that the State may require the submission by the foreign corporation to discriminating taxation as a condition of its continuing in force or renewing the license of the corporation to do business within its confines.[1] It is true the State cannot require foreign corporations to submit to an unconstitutional requirement as a condition of admission. Thus a stipulation in the license to do business that the foreign corporation will not remove a case to the Federal court is void, and will not prevent the removal of a case,[2] nor can the company's agent continuing to do business be punished for violation of a statute containing such a requirement.[3] But on the other hand, the Federal court will not enjoin the enforcement of the revocation of a license to do business, though made according to the terms of a statute directing such revocation when the company removes a case to the Federal court.[4] In this latter case the court said that the State had the power to exclude the foreign corporation, and that its intention or reason in excluding it could not be inquired into.[5]

[1] See Philadelphia Fire Association *v.* New York, *supra.*

[2] Insurance Co. *v.* Morse, 20 Wall. 445.

[3] See Barron *v.* Burnside, 121 U. S. 186.

[4] See Doyle *v.* Insurance Co., 94 U. S. 535.

[5] Justices Bradley, Swayne and Miller dissented, saying that though the State may have the power, if it sees fit, to subject its citizens to the inconvenience of prohibiting all foreign corporations from transacting

§ 170. Holding United States bonds by foreign corporation does not exempt it from taxation on corporate franchises.

Where the tax is upon the privilege of acting or doing business in a corporate capacity, it is immaterial that a portion of the capital stock of the corporation is invested in securities of the United States. As before seen, see § 16, *supra*, it is otherwise where the tax is upon the capital stock or property of the company. It therefore follows that where a foreign corporation is admitted to do business in the State, a tax imposed upon its corporate franchise or right to do business, and graduated according to the dividends of the company, is not invalidated by the fact that a portion of the dividends may be derived from interest on capital invested in United States bonds.[1]

§ 171. Nor is foreign corporation engaged in importing business exempt from tax on corporate franchises.

The same principle has been extended to the case where a foreign corporation is engaged in importing foreign goods and selling the same in the original packages. Thus in a New York case where the tax was imposed, as a tax upon the franchise, upon the amount of the capital stock employed within the State, and a part of the business of a Michigan

business within its jurisdiction, it has no power to impose unconstitutional conditions upon their transacting business. * * * "Any agreement, stipulation or State law precluding them from this right is absolutely void." They said further that the argument that the greater always includes the less, and that therefore if a State may exclude without any cause, it may exclude for a bad cause, is unsound. The practical difficulty with this reasoning is that the State may decline to renew the periodical license without assigning *any* reason. In Waters Pierce Oil Co. *v.* Texas. 177 U. S. 28, it was held that a foreign corporation was bound by the conditions of the permit, whatever its limitations and discriminations.

[1] Home Ins. Co. *v.* New York, 134 U. S. 594.

corporation doing business in New York consisted in the importation of crude drugs and their sale in original packages, it was contended that such part of their business, under the doctrine of Brown *v.* Maryland, could not be taxed by the State. The court however replied: [1] —

"But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

§ 172. Tax upon capital employed within State.

Some States have required, as a condition of the admission of a foreign corporation, the payment of such part of the incorporating tax, fixed by the laws of the State, as represents the portion of the capital of the foreign corporation employed within the State. Such a tax as to corporations doing business in the State only through its consent is clearly within the power of the State to impose. In other States the foreign corporation, in consideration of the privilege of doing business in the State, is required to pay an *annual* tax upon that portion of its entire capital employed within the State. Such capital "employed within the State" would in any event be subject to the taxing power of the State as property or business within its jurisdiction, and the validity of such a tax does not depend upon the consent of the State to the admission of the

[1] New York State *v.* Roberts, 171 U. S. 664.

foreign corporation. The validity of such a method of taxing a foreign corporation is therefore clear.[1]

Under the rule laid down in the Horn Silver Mining Company case, *supra*, § 166, the State could exact a tax discriminating against the foreign corporation, as a condition of admitting it, and in such event the only remedy would be an appeal to the State legislature to remedy the unjust discrimination. But where the tax is only upon the capital employed within the State, there is no discrimination to complain of.

What is the amount of the capital employed within the State is a question of fact, whereon the corporation, when allowed a hearing, is concluded by the action of the State tribunal; and errors in the determination of it would not present a Federal question for review.[2]

§ 173. Discrimination in favor of State manufactures in foreign corporation tax.

The provision in a State law taxing foreign corporations upon the capital employed in the State, but exempting corporations or companies wholly engaged in manufacturing in the State, was held in New York State *v.* Roberts, *supra*, to involve no unlawful discrimination against the manufactured goods of other States. The court said, at page 665: "It is said that the operation of that portion of this taxing law which exempts from a business tax corporations which are wholly engaged in manufacturing within the State of New York, is to encourage manufacturing corporations which seek to do business in that State to bring their plants into New York. Such may be

[1] See New York State *v.* Roberts, *supra*, § 171.

[2] New York State *v.* Roberts, *supra*.

the tendency of the legislation, but so long as the privilege is not restricted to New York corporations it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts."[1]

The reference in the last sentence quoted to the fact that the privilege was not restricted to New York corporations, seems to have been made to show that there was no unlawful discrimination against the manufactured products of other States, and thus no interference with interstate commerce.[2]

§ 174 "Doing business" in State.

A State cannot tax the foreign corporation for the privilege of doing business in its jurisdiction, unless it actually does business therein, and what constitutes doing business must therefore be determined. In a number of States statutes have been enacted, prescribing terms upon which foreign corporations shall be permitted to do business. These usually include the filing of a certificate in a public office,

[1] Justice Harlan, with whom Justice Brown concurred (Justice White not sitting), dissented, saying that such statutes would amount to a tariff protecting goods manufactured in that State against competition in the markets there with goods manufactured in other States. And as to the fact that the exemption was not limited to New York corporations, said at page 683: "This view falls far short of meeting the difficulty presented, namely, that the statute by its necessary operation injuriously discriminates against goods manufactured in other States, in that such goods are not permitted to go into the markets of New York and compete there upon equal terms with like goods wholly manufactured in that State. This court has often said that the objection that a local statute was invalid as restraining or binding commerce among the States was not met by the suggestion that it operated equally upon citizens of the State which enacted it."

[2] See Philadelphia Fire Association *v.* New York, *supra*, § 163 *et seq.* The New York statute has been changed, so that now the exemption is extended to all corporations to the extent of the capital employed in the State in manufacturing and in the sale of the product, see Tax Laws of New York, Ch. 24, Sec. 183.

designating the principal place of business of the corporation in the State, and the resident agent on whom process may be served. Where such certificate is filed, the corporation is concluded by the admission thereby made that it is doing business in the State, and is accordingly liable for the taxation imposed upon it by way of license fee or otherwise as a condition of its admission.[1] Penalties are provided for the transaction of business in the State on behalf of such foreign corporation without the filing of a certificate, and questions have arisen as to what constitutes "doing business" with reference to these statutes. But it is not within the scope of this work to consider the effect of non-compliance with them upon the contracts of the corporation, or upon the rights of foreign corporations to bring suits in the courts to enforce such contracts made in the State.[2]

§ 175. What is not doing business in State.

Irrespective of such statutes however, a corporation is only liable to State taxation, based upon its "doing business," if it in fact does business in the State, and what constitutes "doing business" under such circumstances is to be determined from what it actually does. It cannot consist in the corporation doing what it has the right to do without the consent of the State.

Thus a foreign corporation is not doing business in the State, when it ships its goods to its customers or sends its commercial agents through the State offering to sell or buy, in the course of interstate commerce.

Making a contract in the State was held by the Supreme Court not to constitute doing business therein, within the meaning of the statute requiring the filing of a certificate

[1] People *v.* Philadelphia Fire Association, 92 N. Y. 311.

[2] See Taylor on Corporations, 4th Ed., Sec. 401 and cases cited.

and the appointment of an agent.[1] The court said that as the statute contemplated one or more known places of business in the State, it could not apply to a case where a corporation had only done a single act and did not propose to do more.[2]

The doing business necessary to make a corporation amenable to the taxing power of a State must be distinguished from the doing business which may subject a corporation's agent to punishment for violation of the penal laws of the State, where he undertakes to act therein in behalf of a foreign corporation without the State's consent. A single act by such an agent might subject him to punishment, but could not, whether authorized by the corporation or not, constitute doing business within the State so as to subject the corporation to its taxing laws.

§ 176. Ownership of property in State does not of itself constitute "doing business" in State.

Neither does the ownership within its jurisdiction of property, which becomes subject, as property, to the taxing laws of the State, constitute of itself doing business by the corporation therein.[3] Thus a foreign corporation may ship goods into the State to a commission merchant to be sold for its account, and cause them to be stored in a warehouse in the State so that they become subject as property to the taxing laws of the State, see *supra*, § 148, but that does not of itself locate the corporation in the State.

[1] Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, Justices Matthews and Blatchford basing their concurrence on the ground that the transaction itself was one in interstate commerce and not under control of the State.

[2] As to the distinction between making a contract and "carrying on business," see also Bamberger *v.* Schoolfield, 160 U. S. 149; Wagner *v.* Meakin, 33 C. C. A. 577; Vaughan Machine Co. *v.* Lighthouse, 71 N. Y. S. 799; Empire Milling and Mining Co. *v.* Tombstone Co., 100 Fed. 910; Swann *v.* Mutual Reserve Fund Assn., 100 Fed. 922; Sullivan *v.* Sheehan, 89 Fed. Rep. 247.

[3] Missouri Coal & Mining Co. *v.* Ladd, 160 Mo. 435.

Thus it was held in Pennyslvania that the American Bell Telephone Company of Boston, a Massachusetts corporation, which leased its telephones to Pennsylvania corporations, to be by them operated under patents owned by the patent company according to license contracts, did not in consequence of the ownership and leasing of such property become subject to taxation as a foreign corporation doing business in Pennsylvania.[1] The court said the tax was not upon the telephone instruments as property, but upon the capital stock of the company. The property was in the State and subject to taxation, but the company was not.

In this same case also, it was held that the furnishing of means to the domestic company by the lessor company to transact business under the patents did not constitute a doing business in the State by the foreign company.

Though not a taxation case, the opinion of U. S. Circuit Judge Jackson, later Justice of the Supreme Court, in United States *v.* American Bell Tel. Co., involving the same company, is illustrative. It was claimed that the Massachusetts company was "carrying on business" in Ohio so "as to be subject to service of process" through its "managing agent" in that State, and that the agent of the domestic company was the "managing agent" of the defendant through the relation between the two corporations. The court said that none of the facts, which were the same as the facts in the Pennsylvania case above, constituting the relation between the parties was a "carrying on of business" in Ohio by the foreign company; and that the authorities do not define with exactness what amounts to "carrying on business," but none go to the

[1] Commonwealth *v.* American Bell Telephone Co., 129 Pa. 217; see also People *v.* American Bell Telephone Co., 117 N. Y. 241; Commonwealth *v.* Standard Oil Co., 101 Pa. 119; United States *v.* American Bell Telephone Co., 29 Fed. Rep. 17 (Ohio).

extent of holding that such transactions as those then under consideration are sufficient. On the matter of owning property in the State, the court said at page 44: "But it will hardly do to say that the ownership of property in the State is the doing of business here within the meaning and intent of the law so as to make the owner personally present. It is undoubtedly true that, in respect to the particular property so owned and located within its limits, the State has the authority to proceed against it (*in rem*) for the purpose of taxation, or to subject it to the payment of valid claims and demands against the foreign owner. It cannot, however, serve to bring the *person* of such owner within its jurisdiction, whether that person be a private individual or a patent-holding corporation."

§ 177. Holding stock in domestic company by foreign company is not "doing business" by latter in State.

The argument was advanced in People *v.* American Bell Tel. Co.,[1] that the holding stock by the foreign corporation in the domestic company constituted a doing business by the former in the State. The court held that this was untenable, saying at page 255: "In no legal sense can the business of a corporation be said to be that of its individual stockholders. It is true that they have an interest in the business carried on and an influence in controlling its conduct; but they have created a legal entity to control such business, make its contracts and be responsible for its obligations, and that entity is alone responsible to persons dealing with it for the conduct of such business. The taxation of a foreign or domestic stockholder in a domestic corporation upon the business of such corporation, upon the theory that it was his business, would be an unreasonable exercise of the power of taxation."

[1] 117 N. Y. 241.

§ 178. Supreme Court of Pennsylvania on what constitutes "doing business" in State.

A very illustrative case as to what is and what is not a doing business in the State is the decision of the Supreme Court of Pennsylvania in the case of Commonwealth *v.* Standard Oil Company. The defendant was a corporation of Ohio, with authority to manufacture petroleum or its products. It had received no special authority from the State of Pennsylvania to transact business within its jurisdiction, but it bought crude petroleum in that State through brokers and shipped it to its refineries outside of the State. During the years 1872 to 1880 it owned interests in individual partnerships doing business in Pennsylvania as producers, refiners or transporters of oil. It owned some shares of stock in Pennsylvania corporations, and also had interests in limited partnerships in the same business in different parts of that State. During these years it had declared dividends upon its entire property in and out of the State exceeding the amount of its nominal capital stock. The court held[1] that, under the Pennsylvania statute requiring foreign corporations doing business in the State to pay a tax upon their capital stock, the ownership of the shares of stock in a Pennsylvania corporation and of interests in the limited partnerships and the purchases of oil through brokers did not constitute doing business in Pennsylvania so as to subject defendant to taxation under that statute.

§ 179. What is "doing business" in State.

On the other hand, it was held in the case last cited that the holding of *partnership interests* in Pennsylvania *partnerships* and directly sharing in the profits did constitute doing business within the State.

[1] Commonwealth *v.* The Standard Oil Co., 101 Pa. 119; also Shepp *v.* Traction Co., 17 Montgomery Law Rep. 52.

An illustrative case as to what constitutes doing business was decided in the United States Circuit Court in New York.[1] There a New Jersey corporation had its sales agency and office in New York City, but its plant and factory in another State. It was held to be "doing business" in New York, within the meaning of the statute of that State imposing a tax upon the corporate franchise of any foreign corporation doing business in the State. The court said, referring to the decisions of the New York Court of Appeals in the construction of the same statute:[2] "applying them to the present case, the occasional refining of oil in New York and the occasional storage of products in advance of sales there by complainant, without more, would not constitute doing business here. * * * But a foreign corporation which establishes a business domicile here and brings its property within the jurisdiction, and mingles it with the general mass of commercial capital, is taxable here." The statute meant, by "doing business within the State," using the State as a business domicile for transacting any substantial part, even though a comparatively small part, of the business which the company was organized to carry on and in which its capital was embarked. The court concluded, page 27: —

"It would seem that a manufacturing company which maintains an established location here, and an agent, for the purpose of selling its products or facilitating their sale, carries on a part of its ordinary business here, and has a business domicile here; and if it keeps funds here for maintain-

[1] Southern Cotton Oil Co. *v.* Wemple, 44 Fed. Rep. 24. In People ex rel. Southern Hotel Co. *v.* Wemple, 131 N. Y. 64, the New York Court of Appeals made the same ruling as to the same corporation, saying that the tax was not imposed upon the property, but upon the privilege of doing business in the State as a corporation.

[2] People *v.* Trust Co., 96 N. Y. 387; People *v.* Mining Co., 105 N. Y. 76.

ing its place of business, and to enable it to carry on the operations of its agent, such a foreign company would seem to be taxable under the statute. Certainly it cannot matter that the volume of business done is small, or that the location, instead of being a warehouse or a shop, is an office or a sample room."[1]

In this case the corporation had done no business of any kind in the State of New York except keeping this sales agency and office, and the proceeds of sale were sent to the Philadelphia office, or deposited in bank subject to the draft of that office, excepting only a small bank account of some $2,500 kept in New York for office expenses. The court said that the case was not free from doubt, but their conclusion was that the tax was authorized by the statute.

A foreign pipe line company, laying pipes in a State, and having pumping stations, storage tanks, distributing apparatus and a branch business office in the State was held in New Jersey to be "doing business" in the State, and subject to a corporate franchise license for the privilege.[2]

§ 180. "Doing business" by holding interest in limited partnership.

The Supreme Court of Pennsylvania, in the Standard Oil Company case, *supra*, § 178, ruled that the ownership of shares in a limited partnership in that State did not constitute doing business by a foreign corporation under the statute of that State. It was held however by the New York Court of Appeals, construing the statute of New York, that the tax was properly imposed in that State upon a corporation organized in Germany, which had become a special partner with an investment of $150,000 in a limited partnership in New York, the latter being sole agent for the

[1] See also *infra*, § 181.

[2] Tide Water Pipe Co. *v.* Assessors, 57 N. J. L. 516.

sale of its products in this country.[1] It was decided that the foreign corporation was taxable upon the amount of its contributed capital stock employed in the State of New York. The court declared that it considered the statute in the light of the public policy of the State and looked through the form at the substance. It said of the foreign corporation: "It has, in effect, by this method of a limited partnership established a place within this State for the doing of a part of its business, and though I come to the conclusion with some hesitation, I think that it may be regarded as coming within the operation of the statute."

§ 181. Must have business domicil in State.

The foreign corporation therefore must establish a *business domicil* of some sort in the State before it can become subject as a corporation to the taxing laws of the State by reason of "carrying on business" therein. It may have property in the State which is taxable as property, but neither the ownership of such property, nor the relation of stockholder, patent licensor, nor creditor to a domestic corporation, constitutes "carrying on business" in the State unless it has a business domicil in the State, a sales agency, manufacturing plant, distribution warehouse or an interest in a domestic partnership. It must in some way establish a place within the State for doing some part of its corporate business.

§ 182. Corporations engaged in Federal business.

While the States can thus levy even a discriminating tax upon foreign corporations engaged in doing business in the State, they cannot exclude corporations engaged directly in the business of the Federal government, nor can they

[1] People ex rel. v. Roberts, 152 N. Y. 59, O'Brien, J., dissenting.

impose any license charge or other tax in consideration of permitting such corporation to do business in the State. They may however tax property actually employed in such business equally with other property of the same class in the State. Thus the Supreme Court said in Pembina Mining Co. *v.* Pennsylvania, *supra*, § 165: —

"And undoubtedly a corporation of one State, employed in the business of the general government, may do such business in other States without obtaining a license from them. Thus, to take an illustration from the opinion of Mr. Justice Bradley in a case recently decided by him, 'if Congress should employ a corporation of ship builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union,' and, we may add, without the permission and against the prohibition of the State. Stockton *v.* Baltimore and New York Railroad Co., 32 Fed. Rep. 9, 14."

§ 183. Corporations engaged in "carrying on interstate commerce."

In one sense all commercial business between citizens of different States is interstate commerce. The manufacturer, who ships his goods to a purchaser in another State, is engaged in interstate commerce. But in this connection the term "carrying on interstate commerce" has a peculiar and technical meaning, which limits it to corporations actually engaged in carrying on interstate commerce, that is, common carriers and others, who afford the facilities whereby commerce is carried on between the States. Thus all public carriers, railroads, steamboats, telegraph or telephone companies, bridge and ferry companies, are carrying on interstate commerce in this sense. The State can neither exclude corporations of this class, actually engaged

in interstate commerce, nor can it impose any conditions upon the transaction of their business in the State. A railroad or telegraph company opening an office in the State for its business and a manufacturing corporation, which establishes there a sales office or a sales agency, are both, broadly speaking, engaged in interstate business, but in a different sense. The latter can be taxed by the State for the privilege or excluded, the former cannot.

It has been shown[1] that insurance companies are not engaged in interstate commerce, and can therefore establish agencies in the State only by its consent, and subject to such conditions as it may impose upon foreign corporations wishing to do business in its jurisdiction.

§ 184. Corporations carrying on interstate commerce not exempt from charges for privilege of incorporation.

But this exemption of corporations, *e. g.*, railroad companies, engaged as instrumentalities of interstate commerce, from discriminating State taxation and conditions imposed upon the privilege of entering a State, does not include exemption from charges for the privilege of incorporating under the laws of a State. This was illustrated in an interesting case from Ohio. The Wabash Railroad, as reorganized after foreclosure, being a consolidation of companies existing under the laws of Ohio, Michigan, Indiana, Illinois and Missouri, wished to file its articles of consolidation under the laws of Ohio, as it had in other States. Its aggregate capitalization was fifty-two million dollars, and the State insisted on one-tenth of one per cent of the entire stock as the fee for incorporation under the Ohio law, making the sum of fifty-two thousand dollars. The company offered to pay seven hundred dollars, being one-tenth

[1] *Supra*, § 147.

of one per cent on the capital stock, amounting to only seven hundred thousand dollars, of the only Ohio corporation which went into the consolidation. They claimed that this charge of fifty-two thousand dollars was an attempt on the part of Ohio to lay a burden on commerce and to give extra-territorial force to its taxing power. But the Supreme Court held[1] that it was for the State of Ohio to determine what conditions it would annex to the privilege of incorporation under its laws; that the purpose of tendering the articles to the Secretary of State was to secure to the consolidated company certain powers, immunities and privileges which appertained to a corporation under the laws of Ohio; that the State in granting corporate privileges to its own citizens, or what was equivalent thereto, permitting foreign corporations to become constituent elements of a consolidated corporation organized under its laws, could impose such conditions as it deemed proper; and that this incorporation fee involved no interference with interstate commerce or taxation of property beyond the limits of the State.

[1] Ashley *v.* Ryan, 153 U. S. 436.

CHAPTER VI.

REGULATION OF COMMERCE — THE TAXATION OF STEAMBOATS AND VESSELS.

§ 185. Taxation of vessels as property.
186. Taxable situs of steamboats and vessels at home port.
187. Situs not affected by temporary enrollment as coaster elsewhere.
188. Steamboats on rivers and great lakes.
189. Home port not conclusive as to situs when vessels are permanently and exclusively employed elsewhere.
190. State cannot tax privilege of navigating public waters.
191. Steam tugs cannot be taxed for privilege of navigating rivers.
192. Police control by State over vessels in harbor or in transit.
193. Power of State to license oyster boats and fisheries.
194. State may exact tolls for using rivers and harbors improved at its own cost.
195. Taxation of ferries and bridges.
196. Gloucester Ferry Co. *v.* Pennsylvania.
197. Taxation of interstate bridges.
198. Taxation of interstate bridge not interference with interstate commerce.
199. Taxation of tonnage.
200. Property taxation and compensation for services distinguished from tonnage.
201. Supreme Court on tonnage duties and wharfage charges.
202. Wharfage charges may be graduated by tonnage.
203. But wharfage and similar charges must be without discrimination.
204. Quarantine and pilotage charges.

"No State shall, without the consent of Congress, lay any duty of tonnage."

Constitution of the United States, Article 1, Sec. 10, Par. 3.

§ 185. Taxation of vessels as property.

The taxation of steamboats and other vessels navigating the public, that is the navigable waters of the United States,—those which by themselves or in connection with other waters form a continuous channel for commerce be-

tween the States or with foreign nations, — has a direct relation to the regulation of such commerce, and the taxing power of the State is therefore limited not only by the specific prohibition in the Constitution against levying any tax upon tonnage, but also by the necessity of not interfering with the paramount control over commerce vested in Congress.

Steamboats and other vessels employed upon waters entirely within the jurisdiction of the State and having no water connection with other States or foreign countries, are taxable like other property within the jurisdiction of the State, and no Federal question is involved in such taxation. But when they are employed in interstate or foreign commerce, the taxing power of the State is limited, both as to the place and manner of taxation, so that they can only be taxed where they have a taxable *situs*. Any attempted taxation in other places is void as an interference with commerce, and while they can be taxed at their *situs* as property, no tax can be laid upon tonnage.

§ 186. Taxable situs of steamboats and vessels at home port.

Steamboats and vessels navigating the public or navigable waters of the United States are taxable as property, irrespective of the residence of the owners, in the home port of the vessels, which is said to be their *situs* for taxation. Thus the steamers of the Pacific Mail Steamship Company owned by a New York corporation, registered at the custom house in New York, and employed in transporting passengers and freight between Panama and San Francisco, had no taxable *situs* in San Francisco.[1] The court said: —

"Our merchant vessels are not unfrequently absent for

[1] Hays *v.* Pacific Mail Steamship Co., 17 Howard, 596; see also Transportation Co. *v.* Wheeling, 99 U. S. 273.

years in the foreign carrying trade, seeking cargo, carrying and unlading it from port to port, during all the time absent; but they never lose their national character nor their home port, as inscribed upon their stern.

"The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State is familiar in the admiralty law. She is subjected in many cases to the application of a different set of principles. 7 Pet. 324; 4 Wheat. 438.

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation, they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

§ 187. Situs not affected by temporary enrollment as coaster elsewhere.

The fact that a vessel enrolled in one State at the port nearest where her owner usually resides is enrolled as a coaster at a port in another State, where she is employed as one of a daily line of steamers between that port and a port in a third State, does not cause her to become incorporated in the personal property of the State in which she is thus enrolled as a coaster. The fact that the vessel was physically within the limits of the State at the time the tax was levied did not decide the question any more than his physical presence would decide it in case of a traveler passing through with his private carriage.[1]

The ferry boats operating between St. Louis and East St.

[1] Morgan *v.* Parham, 16 Wallace, 477.

Louis belonged to an Illinois corporation, and though enrolled in the city of St. Louis, when not in actual use, were laid up on the Illinois shore. They were held to have no taxable *situs* as property in St. Louis.[1] It was said in this case that the home port of the vessel under the United States Registry Laws, declaring the home port shall be that at or near which her owner resides, depends wholly upon the locality of the owner's residence, and not upon the place of the enrollment. The purpose in this case, said the court, was not to tax the property through the proprietor, but to tax the property itself by reason of its being "within the city," and the boats were not "in the city" within the meaning of the statute.

§ 188. **Steamboats on rivers and Great Lakes.**

Steamboats owned by a West Virginia company having its principal office in Wheeling, plying between different ports on the Ohio River, were properly taxable by the State of West Virginia in Wheeling on their value as personal property, under a statute authorizing that city to assess and collect an annual tax for the use of the State on personal property within its precincts.[2] It was said that the State could not tax ships as the instruments of commerce, but could tax the owners for their interest in them as personal property.

Thus steamers and vessels employed on the great lakes, having the name of their home port and the city of their owner's domicil painted thereon, as required by the United

[1] St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423, on appeal from the U. S. Circuit Court. In another case the Supreme Court of Missouri had held the boats taxable in St. Louis, St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580. As to the home port of a vessel under these decisions, see The Lotus No. 2, 26 Fep. Rep. 637. See also 2 Dillon's Municipal Corporations, 4th Ed., Sec. 786 *et seq.* and cases cited.

[2] Transportation Co. *v.* Wheeling, 99 U. S. 273.

States Revised Statutes, Section 4178, have their *situs* for the purposes of taxation at their home port, and cannot be taxed as property of another State.[1] Where the place of enrollment is the same as the residence of the owner, that place is of course the home port and the *situs* for taxation. Under the provision of the Registry Laws referred to above, that port will, as a rule, be the place of State taxation, and it would seem that the same port, the place of enrollment, would be the *situs* for taxation, even if one or more of the part owners reside elsewhere.[2]

§ 189. **Home port, when not conclusive as to situs.**

It has been held in a recent case in a State court, though the question does not seem to have been definitely decided by the United States Supreme Court, that, while the place of enrollment is presumptive evidence of *situs* for taxation, it is not conclusive. Ocean-going tug-boats were declared subject to taxation by the State of Washington, because they were used exclusively in the waters of that State, although they were registered and owned in the State of California.[3] The Court said in that case, l. c. page 215: —

"Sound reasons exist for the right of the State to tax these vessels that are permanently here transacting local business. They receive the full protection of the local government, and, if mere registry in another port is conclusive against the right to tax here, a boat can operate in our local waters, confined entirely to local business, and, if owned elsewhere, may evade all taxation in this State. Such construction should not be adopted unless imperatively demanded by superior authority. Under the revenue

[1] Yost *v.* Lake Erie Transportation Co., 6th Circuit, 112 Fed. Rep. 746.

[2] See 2 Dillon on Municipal Corporations, Sec. 786 *et seq.* and cases cited.

[3] Northwestern Lumber Co. *v.* Chehalis County (Wash.), 54 L. R. A. 212. See also National Dredging Co. *v.* State, 99 Ala. 462.

law of this State, personal property is taxed at its situs, and without reference to the residence of the owner."

And it was also said, quoting from the Supreme Court of Alabama: —

"The question indeed is at last one of situs in fact, and where this is shown neither foreign registry nor foreign ownership is of any consequence."

It was held however by the Supreme Court of Florida, that steamboats belonging to a New York company and registered in New York, employed during the winter season on the St. John's River, but during the remainder of the year in such waters as would be most profitable in other parts of the country, were not taxable in Florida. The court said: —

"We do not say that registration in a foreign port and non-resident ownership should control absolutely. But such ownership and registration render them primarily and presumptively taxable only in their home port."[1]

§ 190. State cannot tax privilege of navigating public waters.

The power of the State is limited to the taxation of boats and other instrumentalities of commerce as property. Thus a municipal ordinance of the city of New Orleans, imposing a license on the business of running tug tow-boats to and from the Gulf of Mexico, was an attempted regulation of commerce and invalid.[2] The Supreme Court said that it is undoubtedly true, as has often been judicially declared, that vessels engaged in foreign and interstate commerce and duly enrolled and licensed under the Acts of Congress may be taxed by State authority as property, provided the tax is not a tonnage duty and is levied only at the port

[1] Johnson *v.* De Bary-Baya Merchants' Line, 37 Fla. 499, 37 L. R. A. 518.

[2] Moran *v.* New Orleans, 112 U. S. 69.

of registry, and the vessels are valued like other property in the State, without unfavorable discrimination on account of their employment. It added, p. 75: —

"The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States. The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him, for using his boats in this way, he shall not be permitted to act under, and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon payment of the tax. In such an opposition, the only question is, which is the superior authority; and reduced to that, it furnishes its own answer."

The principle is the same, whether the vessels are owned by a home or a foreign corporation. Thus a foreign corporation, whose vessels while *en route* between the ports of two different States stop at the port of a third State, is not liable at that port for a license tax, because it there leases a wharf or landing, and has a plant and machinery for the taking on and discharge of its freight and passengers, employees, an agent, a bank account and an office, and occasionally purchases supplies. All such operations are an essential and integral part of interstate business, and the State cannot impose a tax upon the privilege of conducting such business.[1]

[1] Clyde S. S. Co. *v.* City Council of Charleston, 76 Fed. Rep. 46.

§ 191. Steam tugs cannot be taxed for privilege of navigating rivers.

The same principle has been applied by the Supreme Court to steam tugs engaged in the business of towing vessels into and out of the Chicago river and harbor from and to the lake. They were engaged in interstate and foreign commerce, their business could not be distinguished from that in which the vessels towed were engaged, and they could not be compelled to pay a license fee to the city of Chicago.[1] It was also immaterial that the Chicago river had been deepened for navigation purposes by dredging, under the direction and at the expense of the city, for the license was not exacted as a toll for the specific purpose of improving the river, and the case therefore did not come within the principle of those decisions which hold that a tax or toll levied by a State upon those using its rivers and harbors improved at its own cost is not in violation of the Federal Constitution.[2] The opinion, referring to one of these cases, Sands *v.* Manistee River Improvement Co., *infra*, § 194, said, page 412: —

"When the case came before this court it was held that the internal commerce of a State, that is, the commerce which is wholly confined within its limits, is as much under its control as foreign or interstate commerce is under the control of the general government, and, to encourage the growth of that commerce and render it safe, States might provide for the removal of obstructions from their rivers and harbors and deepen their channels and improve them in other ways, and levy a general tax or toll upon those who use the improvements to meet their cost, provided the free navigation of the waters, as permitted by the laws of

[1] Harman *v.* City of Chicago, 147 U. S. 396, reversing 140 Ill. 374. See also Frere *v.* Von Schoeler, 47 La. Ann. 324.

[2] Sands *v.* Manistee River Impt. Co., 123 U. S. 288; Huse *v.* Glover, 119 U. S. 543, *infra*, § 194.

the United States, was not impaired, and provided any system for the improvement of their navigation instituted by the general government was not defeated. No legislation of Congress was, by the statute of Michigan, in that case interfered with, nor any right conferred, under the legislation of Congress, in the navigation of the river by licensed or enrolled vessels, impaired, defeated or burdened in any respect. It was the improvement of a river wholly within the State, and, therefore, until Congress took action on the subject, wholly under the control of the authorities of the State."

§ 192. Police control by State over vessels in harbor or in transit.

The police control of the State or of a municipality acting under State authority is co-extensive with its jurisdiction. Pilot and harbor regulations, when not in conflict with the Federal Constitution or Federal regulation, are valid. But vessels in transit are not within the jurisdiction of the State so as to be subject to the local license taxes, as for selling liquors on board.[1] Police regulations however licensing and regulating public exhibitions on board steamboats in the harbor[2] have been held valid as police regulations and not invalid as regulations of commerce.[3]

In Kentucky a license tax upon any person residing upon a boat in a navigable river was held valid.[4] The court said

[1] State *v.* Frappart, 31 La. Ann. 340.

[2] A city ordinance exacting a license from boats in the Mississippi river was held invalid as to a tow-boat licensed under Act of Congress in the coasting trade, St. Louis *v.* Coal Co., 158 Mo. 342. For earlier State cases sustaining licenses held invalid under the rule in Moran *v.* New Orleans, *supra*, § 190, and Harman *v.* Chicago, *supra*, § 191, see Chilvers *v.* People, 11 Mich. 43; Lightburne *v.* Taxing District, 4 Lea 219; Newport *v.* Taylor, 16 B. Monroe 699; New Orleans *v.* Eclipse Towboat Co., 33 La. Ann.647.

[3] Board of Selectmen *v.* Spalding, 8 La. Ann. 87.

[4] Robertson *v.* Commonwealth of Kentucky, 19 Ky. Law Rep. 442.

in that case that plaintiff had no right to use the public highway except in common with the public and in pursuance of the purposes of its dedication, unless by consent of the government; that the waters of the Ohio were within the jurisdiction of Kentucky and the statute in question was justified under the police power.

§ 193. Power of State to license oyster boats and fisheries.

Subject to the paramount right of navigation, the regulation of which has been granted to the Federal government, each State owns the beds of all tide-waters and public waters within its jurisdiction, and may appropriate them to be used as a common by its citizens.[1] Thus a State may provide that none may take, plant or cultivate oysters under its tidal waters, except such as shall be licensed, and may confine the right to obtain licenses to its own citizens.[2] But a statute prohibiting the use of vessels to buy oysters on Chesapeake Bay, unless under license obtained from the State conditioned upon a twelve months residence therein and payment of a tonnage fee, was unconstitutional on the double ground that it denied to citizens of other States the privileges enjoyed by citizens of that State and that it imposed a tonnage tax.[3] A license fee however of three dollars per ton, required from every vessel employed in dredging for oysters within the waters of the State was held a valid exercise of the State's proprietary rights.[4] A vessel enrolled and licensed under the laws of the United States is not on that account exempt from such

[1] McCready *v.* Virginia, 94 U. S. 391.

[2] State *v.* Corson, 65 N. J. L. 502, 50 Atl. Rep. 780.

[3] Booth *v.* Lloyd (Md.), 33 Fed. 598.

[4] Dize *v.* Lloyd (Md.), 36 Fed. 651; State *v.* Loper, 46 N. J. L. 321; Morgan *v.* Commonwealth (Va.), 98 Va. 812.

State regulations.[1] "The right which the people of the State thus acquire" in the oyster beds and fisheries "comes not from their citizenship alone, but from their citizenship and property combined," in the language of the Supreme Court in McCready *v.* Virginia. "It is in fact a property right, and not a mere privilege or immunity of citizenship." The State therefore determines the conditions on which the products of the oyster beds and fisheries become subjects of commerce.

§ 194. State may exact tolls for using rivers and harbors improved at its own cost.

A State may make improvements in a navigable stream within its borders and collect reasonable tolls from vessels as a compensation for using the improved facilities. This principle was first applied by the Supreme Court[2] in holding valid the regulations made by the city of Chicago for the use of the Chicago river. The court said that, until Congress acted, the State of Illinois had plenary authority over the bridges across the river and could vest in the city of Chicago jurisdiction over the construction, repair and use of such bridges, and that there was nothing in the Northwestern Ordinance of 1787 or in the subsequent legislation of Congress, which precluded the State from exercising this power.

The principle was further applied in sustaining the right of the State to exact tolls from vessels passing through the Illinois river, which had been improved at the expense of the State.[3] Such a charge, said the court, was not a duty upon tonnage but was analogous to a charge for the use of wharves and docks constructed to facilitate the landing of

[1] Manchester *v.* Massachusetts, 139 U. S. 240; Smith *v.* Maryland, 18 How. 269.

[2] Escanaba Company *v.* Chicago, 107 U. S. 678.

[3] Huse *v.* Glover, 119 U. S. 543.

passengers and freight and taking them on board and for the repair of vessels. In this case the rates of toll were prescribed according to the tonnage of the vessels and the amount of freight carried by them through the locks of the river. The court said that this was simply a mode of fixing the rate according to the size of the vessel and the amount of property it carried, and was in no sense a duty upon tonnage within the prohibition of the Constitution.

The question came before the court again in a case involving the improvement made by the State of Michigan in the Manistee river.[1] The court held that, as the Manistee river was wholly within the limits of Michigan, the State could authorize any improvement which in its judgment would enhance the value of the river as a means of transportation from one part of the State to another, and to meet the cost of such improvement the State could levy a general tax or lay a toll upon all who used the river and harbors as improved. It was urged that the terms of the Northwestern Ordinance, respecting the freedom of the navigable waters of the territory, bound the people of the territory when subsequently formed into States. The court replied that, although it was doubtless supposed by the framers of that ordinance that its words would always be considered a binding obligation, yet, from the very conditions under which the States formed from its territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. But, independently of this consideration, nothing in the ordinance prevented the State from improving the river and charging a reasonable toll as compensation for the improvement.

[1] Sands *v.* Manistee River Improvement Co., 123 U. S. 288.

§ 195. **Taxation of ferries and bridges.**

The establishment and licensing of ferries[1] and the establishment of bridges across the navigable waters of a State[2] are within what is termed the concurrent jurisdiction of the State and Federal governments in the regulation of commerce. As to this class of cases, it is not the mere existence of the power but its *exercise* by Congress, which is incompatible with the exercise of the same power by the States, and the latter may legislate in the absence of congressional legislation. The State may therefore establish and license a ferry or a bridge over a navigable stream, though the latter must be approved by Congress as being a lawful structure not interfering with navigation, and it was held by the Supreme Court in a recent case[3] that Congress alone possesses the requisite power to regulate charges upon such a bridge.

There is a distinction between bridges and ferries over navigable rivers which separate States and those which are wholly within the limits of a State, as Congress has no control over commerce which is entirely within the limits of a State.[4]

Applying the principle declared in the cases above quoted, distinguishing between the property employed as instrumentalities of commerce and the business of conducting the commerce itself, the taxing power of the State would seem to

[1] Conway *v.* Taylor, 1 Black 603.

[2] Cardwell *v.* American Bridge Co., 113 U. S. 205; Covington Bridge Co. *v.* Kentucky, 154 U. S. 204.

[3] Covington Bridge Co. *v.* Kentucky, *supra.* Four judges dissented, holding that the States had the power to regulate tolls both on bridges and ferries, subject to the paramount authority of Congress, and the failure of Congress to act manifested its intention that the rates of toll should be as established by the two States, in the case of an interstate bridge.

[4] See United States *v.* Morrison, Federal Cases No. 15,465; but see United States *v.* Jackson, Federal Cases No. 15,458.

be limited in the taxation of bridges and ferries to the taxation of the property employed therein, such as the bridge and approaches, the ferry-boats and other property of the ferry. The Supreme Court sustained however [1] a license of a certain sum for each boat levied by the city of East St. Louis upon the ferry company, saying that the power to license is a police power, although it can also be used for purposes of revenue, and that the exaction of the license fee by the State within which the property had its *situs* was not a regulation of commerce. The license fee was levied, not on the ferry-boat, but on the ferry-keeper.[2]

§ 196. Gloucester Ferry Co. v. Pennsylvania.

The ferry-boats between Gloucester in New Jersey and the city of Philadelphia belonged to a New Jersey company and were registered in Camden, N. J. No property was owned by the company in Philadelphia except the docks where the boats were landed and where they remained only long enough to receive and discharge passengers and freight.

[1] Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, affirming the Supreme Court of Illinois, 102 Ill. 514.

[2] This case was referred to in the opinion in Covington Bridge Co. *v.* Kentucky, *supra*. In United States Express Co. *v.* Allen, 39 Fed. Rep. 714, it is said that the Supreme Court in Leloup *v.* Mobile, 127 U. S. 640, substantially overrules this case, as well as that of Osborne *v.* Mobile, 16 Wall. 479, and that the language of the court, though directed to the Osborne case, must in principle apply with equal force to the Wiggins Ferry case. Wiggins Ferry Co. *v.* East St. Louis was also distinguished by the United States Circuit Court for the Southern District of Illinois, in St. Clair County *v.* The Interstate Car Transfer Co., 109 Fed. R. 741, where it was held that the county of St. Clair, wherein the city of East St. Louis is situated, could not exact a license fee for the operation of a ferry transferring railroad cars across the Mississippi from East St. Louis to St. Louis. There the corporation owning and operating the ferry was a Missouri corporation domiciled in St. Louis, and the boats had their *situs* in St. Louis, and the only property in Illinois consisted of a landing place and facilities.

The Supreme Court, reversing the Supreme Court of Pennsylvania,[1] decided that the ferry company was not taxable in Pennsylvania upon its capital stock. Its business was interstate commerce, and, whether this was conducted by individuals or corporations, the property employed in it could be taxed only where it had its taxable *situs*.

After reviewing the cases, the court stated at page 217, that, although the privilege of keeping a ferry, with the right to take toll for passengers and freight, is a franchise grantable by the State, still the fact remains that such a ferry is a necessary means of commercial intercourse between the States bordering on their dividing waters, and it must therefore be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not of course imply exemption from reasonable charges for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of interstate transportation.

"How conflicting legislation of the two States on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware river. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferry-keepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in

[1] Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196

the present case is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

§ 197. Taxation of interstate bridges.

Bridges over navigable rivers separating two States have been held properly taxable by each State for that part of the tangible and intangible property of the bridge located therein.[1] The court said that the company was chartered by the State of Kentucky to build and operate a bridge, and that State could properly include the value of the franchises it had granted in the valuation of the company's property. The Act of Congress conferred on the company no right or franchise to erect the bridge or to collect tolls for its use. It merely regulated the height of the bridge over the river and the width of its spans, in order that it might not interfere with navigation.

In a later case the same bridge company was held properly taxable by the city of Henderson on so much of its property as was permanently between low water mark on the Kentucky shore and low water mark on the Indiana shore of the Ohio River, it being settled that the boundary of Kentucky extended to that point, and that the power of Kentucky to tax the bridge was not affected by the fact that it was erected by the authority and with the consent of Congress.

[1] Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, Justices White, Field, Harlan and Brown dissenting.

[2] Henderson Bridge Co. *v.* Henderson, 173 U. S. 592. See *infra*, Chapter VII, "Taxation of Interstate Carriers."

§ 198. Taxation of interstate bridge not interference with interstate commerce.

As to the alleged interference with interstate commerce, the court said, at page 153: —

"Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted."

In a later case, involving the taxation of the Keokuk and Hamilton Bridge, the boundary line which divided the bridge was declared to be the boundary line between the two States of Iowa and Illinois, and this was the middle of the main navigable channel of the Mississippi river. The determination therefore of the line which divided the bridge between the two States was a question of fact, and it was not within the province of the court to review the findings of the Supreme Court of Illinois as to the part assessed in Illinois.[1] It was claimed in this case that no part of the capital stock was assessable, because the tax upon it was a tax upon interstate commerce and upon a franchise conferred by the Federal government, but this position was adjudged untenable.

The increased value of a track by reason of a bridge, when the bridge is part of a line of railway, in another case was said to be properly taken into consideration in the assessment of the value of the track, the separate

[1] Keokuk & Hamilton Bridge Co. *v.* Illinois, 175 U. S. 626.

assessment of the value of the bridge and track being a difference of form rather than of substance.[1]

§ 199. Taxation of tonnage.

The prohibition of any tax upon tonnage was obviously supplementary to the grant to Congress of control over interstate and foreign commerce, and should be construed in connection therewith.

What is a tax upon tonnage within the meaning of this prohibition can only be determined by the judicial process of inclusion and exclusion. A duty upon tonnage within the meaning of the Constitution is a charge upon a vessel as an instrument of commerce according to its tonnage, for the privilege of entering or leaving a port or navigating the public waters of the country; and the prohibition was designed to prevent the States from imposing hindrances of this kind on trading in vessels.[2] A statute of Louisiana, that the Master and Wardens of the Port should be entitled to demand and receive in addition to other fees the sum of five dollars, whether called on to perform any service or not, for every vessel arriving in port, was declared to be a duty on tonnage. The court said at page 34: —

"In the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain

[1] Pittsburgh, etc., R. Co. *v.* Board of Public Works of West Virginia, 172 U. S. 32; see also Lumberville Bridge Co. *v.* State Board of Assessors, 55 N. J. L. 529, and 25 L. R. A. 134, holding that a tax by the State of New Jersey of one-tenth of one per cent upon the whole of the capital stock of a bridge company, incorporated for building a bridge between New Jersey and Pennsylvania and requiring concurrent legislation of both States, was valid.

[2] See Huse *v.* Glover, 119 U. S. 543.

that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. * * * It was not only a pro rata tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."[1]

In the State Tonnage Tax Cases from Alabama,[2] a tax levied by Alabama on all steamboats, vessels and other craft plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage, was held to be a tax upon tonnage, and the language of the act showed clearly that it was intended to be a tax on the boats as instruments of commerce and not as property in the State. The court said that it was immaterial whether the ships or vessels taxed belonged to citizens of that State or to citizens of other States, as the prohibition was general, withdrawing altogether from the State the power to lay any duties on tonnage, under any circumstances, without the consent of Congress.

An ordinance of the city of New Orleans levying duties at the rate of ten cents per ton on all steamboats mooring or landing at the port, if in port not exceeding five days, and of five dollars per day after the five days, though the port of New Orleans includes some twenty-two miles on which wharves had been built for only about two miles, was a tax upon tonnage in violation of the Constitution.[3] The court said that it could not be supported as a compensation for the use of the city's wharves and was really a tax for the privilege of arriving and departing from the port. A fee of one and one-half cents per ton, required by the New York statute to be paid by all ships or vessels

[1] Steamship Co. *v.* Portwardens, 6 Wall. 31.
[2] 12 Wallace 204.
[3] Cannon *v.* New Orleans, 20 Wallace 577.

entering the ports of New York and loading or unloading therein, was held to be a tax upon tonnage.[1]

So also was an act of Texas invalid, which required every vessel arriving at quarantine stations in the State to pay five dollars for the first one hundred tons and one and one-half cents for each additional ton. As this was for defraying the expenses of the quarantine regulations, it was claimed to be justified by the decision in Gibbons *v.* Ogden, where the court speaks of quarantine and inspection laws as being within the jurisdiction justly exercised by the States themselves in the regulation of commerce. The Supreme Court said[2] that, while the power to establish quarantine laws rests with the States, it cannot be exercised in violation of the restrictions imposed by the Federal Constitution upon their taxing power, and the tax was adjudged invalid as being upon tonnage. An example of a valid quarantine regulation, involving the payment of a fee graduated according to tonnage, may be found in Morgan's Steamship Co. *v.* Board of Health.[3]

§ 200. Property taxation and compensation for services distinguished from tonnage.

A property tax lawfully levied upon the vessel as property, where it has a taxable *situs*, is not a duty upon tonnage. Thus in Transportation Co. *v.* Wheeling,[4] the boats used in navigating the Ohio river between Wheeling and Parkersburg, and, when not in use, laid up at Wheeling, owned by a West Virginia company, whose principal office was at Wheeling and whose stock belonged principally to citizens of West Virginia and Ohio, were held properly taxable at Wheeling. A tax so levied moreover was not a

[1] Inman Steamship Co. *v.* Tinker, 94 U. S. 238.
[2] Peete *v.* Morgan, 19 Wallace 581.
[3] 118 U. S. 455.
[4] 99 U. S. 273.

tax upon tonnage. The court said that taxes levied by the State upon vessels owned by its citizens as property, based on the value of the same as property, are not within the prohibition of the Constitution, and that assessments of this kind, when levied for municipal purposes, must be made against the owner of the property and can only be made in the municipality where the owner resides.

On the other hand it is not a duty upon tonnage where the charge imposed is only a reasonable charge for services rendered, as for the use of an improved wharf in a municipality, even if the charge is proportioned to the tonnage of the vessel. Such charges have been sustained in a number of cases.[1]

Thus, in the case of Transportation Company *v.* Parkersburg, the exaction of the fee was sustained, although plaintiff claimed that the rates charged were exorbitant and were merely a pretext for a duty on tonnage. But the court refused to inquire into the secret purpose of the city. Upon the distinction between a duty on tonnage and wharfage charges it said: —

§ 201. Supreme Court on tonnage duties and wharfage charges.

"When the Constitution declares that 'No State shall, without the consent of Congress, lay any duty of tonnage;' and when Congress, in sect. 4220 of the Revised Statutes, declares that 'no vessel belonging to any citizen of the United States, trading from one port within the United States to another port within the United States, or employed in the bank, whale or other fisheries, shall be subject to tonnage tax or duty, if such vessel be licensed,

[1] Packet Co. *v.* Keokuk, 95 U. S. 80; Packet Co. *v.* St. Louis, 100 U. S. 423; Vicksburg *v.* Tobin, 100 U. S. 430; Packet Co. *v.* Catlettsburg, 105 U. S. 559; Transportation Co. *v.* Parkersburg, 107 U. S. 691.

registered, or enrolled,' they mean by the phrases, 'duty of tonnage,' and 'tonnage tax or duty,' a charge, tax, or duty on a vessel for the privilege of entering a port; and although usually levied according to tonnage, and so acquiring its name, it is not confined to that method of rating the charge. It has nothing to do with wharfage, which is a charge against a vessel for using or lying at a wharf or landing. The one is imposed by the government, the other by the owner of the wharf or landing. The one is a commercial regulation, dictated by the general policy of the country upon considerations having reference to its commerce, or revenue; the other is a rent charged by the owner of the property for its temporary use. It is obvious that the mode of rating the charge in either case, whether according to the size or capacity of the vessel, or otherwise, has nothing to do with its essential nature. It is also obvious that since a wharf is property, and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant.''[1]

§ 202. **Wharfage charges may be graduated by tonnage.**

Charges for wharfage may be graduated by the tonnage of vessels using the wharves, and this is not a duty on ton-

[1] The opinion contains an exhaustive review of the cases, but holds that the reasonableness of the charge for wharfage must be determined by the laws of the State within whose jurisdiction the wharf is situated. Justice Harlan dissented, holding that the courts of the Union are empowered to protect the rights of free commerce against unreasonable exactions.

nage. An ordinance of New Orleans therefore fixing the rates at so much per ton for using the new wharf, the proceeds being used to repair that wharf and construct new ones, was valid.[1] The tolls levied by the State of Illinois upon the passage of vessels through the locks of the Illinois river, as compensation for the outlay of the State in improving the navigation of the river, were held to be valid on the same principle, as the State was allowed to charge compensation for the use of wharves and docks, and there was nothing in the objection that the rates of toll were according to tonnage and the amount of freight.[2]

§ 203. But wharfage and similar charges must be without discrimination.

But the right of the State, or municipality acting under State authority, to make reasonable charges for the use of improved wharves and similar privileges is subject to the qualification incident to the exercise of its taxing authority by a State in any case, that it must be without discrimination against the citizens and products of other States. This was forcibly illustrated in the case of Guy *v.* Baltimore,[3] where a city wharfage charge had been in force some fifty years and was declared invalid as interfering with commerce, on the ground that it was exacted only from vessels transporting goods or articles other than the products of the State. It was argued that the city, as the owner of the wharves, had the right to permit their free use by vessels loaded with the products of Maryland, and that others could not complain so long as they were not required to pay more than a reasonable compensation. The

[1] Ouachita Packet Co. *v.* Aiken, 121 U. S. 444.

[2] Huse *v.* Glover, 119 U. S. 543; see also Escanaba Co. *v.* Chicago, 107 U. S. 678; Sands *v.* Manistee Improvement Co., 123 U. S. 288.

[3] 100 U. S. 434.

court said that the vice was in the discrimination, and that the city could no more discriminate in the use of the wharves than it could in the use of the public streets or other highways. If it permitted citizens of that State to use them without charge, it must give the same privilege to citizens and vessels of other States, and the State could, by neither direct nor indirect means, build up its domestic commerce through the imposition of unequal and oppressive burdens upon the business and industries of other States. The opinion continues at page 443: —

"Such exactions, in the name of wharfage, must be regarded as taxation upon interstate commerce. Municipal corporations, owning wharves upon the public navigable waters of the United States, and *quasi* public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several States and with foreign nations."

§ 204. **Quarantine and pilotage charges.**

Inspection laws of the State are expressly authorized by the Constitution, see *supra*, § 129, and quarantine laws belong to that class of State legislation which is valid until forbidden by Congress, unless it covers the same ground that is covered by the legislation of Congress.[1] In the absence of such Federal legislation, Congress is deemed to have, in effect, adopted the State laws and forbidden interference with their enforcement. The fees collected under the quarantine laws of Louisiana were therefore valid; they were not tonnage taxes within the meaning of the word as used in the Constitution, but compensation for services rendered. The court said, at page 463, that the fee complained of, $30 a vessel, was not a tax within the

[1] Morgan's Steamship Co. *v.* Louisiana, 118 U. S. 455.

meaning of that word as used in the Constitution, nor did the exaction of the fee amount to a regulation of commerce under the Constitution.[1] The enforcement of these quarantine regulations and the collection of these charges did not give the ports of any other State a preference over those of Louisiana.

State pilotage laws and the fees connected therewith for pilotage services were held by the Supreme Court in the leading case[2] to be regulations of commerce of the class which do not require a uniform rule and which can properly be governed by rules varying with the locality, subject however to the paramount control of Congress whenever Congress deems proper to exercise its power.[3] The court in this case sustained the act of Pennsylvania, according to which a vessel refusing to take a pilot forfeited to the Master Warden of the Pilots for the use of a society for the relief of pilots one-half of the amount of pilotage. Such a law did not give a preference to the ports of one State over those of another, nor was it a violation of the Constitution providing that the vessels to or from one State shall not be obliged to enter, clear or pay duties in another. The pilotage fees were not duties within the meaning of the Constitution. This ruling has been consistently adhered to.[4]

[1] Justice Bradley dissented.

[2] Cooley *v.* Port Wardens, 12 Howard 299.

[3] Sinnott *v.* Com. of Mobile, 22 How. 227; Foster *v.* Com. of Pilotage, 22 How. 245.

[4] Ex parte McNeil, 13 Wall. 236. See also Covington Bridge Co. *v.* Kentucky, 154 U. S. 204, 211; Huus *v.* Porto Rico Steamship Co., 182 U. S. 392, holding that a vessel engaged in trade between Porto Rican ports and the ports of the United States was not subject to the New York pilotage laws, because it was engaged in the coastwise commerce of the country within the meaning of the Act of Congress, subjecting such vessels to the navigation laws of the United States. This coasting trade was intended to include the domestic trade of the United States by other than interior waters.

CHAPTER VII.

TAXATION OF INTERSTATE COMMERCE.

§ 205. Difficulty of defining line between Federal and State power.
206. License taxation.
207. Osborne *v.* Mobile.
208. Osborne *v.* Mobile overruled.
209. License tax on agents of interstate railroads held invalid.
210. Immaterial that license interfering with commerce purports to be for regulation and not for revenue.
211. License for privilege of transacting local business is valid.
212. Decision of State court that license only applies to local business conclusive.
213. It must clearly appear that intra-state business alone is taxed.
214. License must not be condition for transacting interstate business.
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216. Tax on interstate telegraph messages invalid.
217. Privilege tax on sleeping cars.
218. Compensation exacted by city for use of poles in streets not regulation of commerce.
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220. Taxation of rolling stock.
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225. State tax on freight invalid.
226. State tax on railway gross receipts.
227. Mileage apportionment in interstate railway taxation.
228. Taxation of net earnings sustained.
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230. Tax on gross receipts held invalid in State courts.
231. Maine *v.* Grand Trunk R. R. Co.
232. Tax on gross earnings apportioned by mileage valid as excise tax.
233. Principle reaffirmed.
234. Immaterial whether corporation is domestic or foreign.
235. Tax not upon receipts as such but excise tax apportioned to receipts.
236. State tax on net receipts.
237. Valuation of property by capitalization of receipts.

§ 205. Difficulty of defining line between Federal and State power.

The most important and difficult questions, in defining the line between the Federal regulation of commerce and the taxing power of the State, have arisen in connection with taxation upon the great railroad, telegraph and express systems, which penetrate the different States and transact both local and interstate business. Every form of taxation upon these great properties which has been attempted has been contested in its application, on account of alleged interference with interstate commerce. The decisions of the Supreme Court upon the questions presented in this class of cases have not been uniform, and the difficulty of defining the line where the State and Federal powers meet is illustrated by the frequent dissents in the court and the overruling of decisions by the same judges who pronounced them. Thus the court said in a recent case:[1] —

"Owing to the paramount necessity of maintaining untrammeled freedom of commercial intercourse between the citizens of the different States and to the fact that so frequently transportation and telegraph companies transact both local and interstate business, it has been found difficult to clearly define the line where the State and the Federal powers meet. That difficulty has been chiefly felt by this court in dealing with questions of taxation, and is shown by the not infrequent dissents by members of the court when the effort has been made to formulate a general statement of the law applicable to such questions."

§ 206. License taxation.

The exaction of license fees for the purpose of revenue is a common method of taxation, especially in the Southern

[1] Erie R. R. Co. v. Pennsylvania, 158 U. S. 437.

States. Thus there are business, occupation and privilege taxes, which are levied both by the State directly and by the municipalities under State authority, and all of which are in some States called by the generic name of "privilege" taxes. As heretofore shown, such taxation as to all persons and occupations within the jurisdiction of the State is a legitimate method of State taxation limited only by its own discretion and the restrictions of its own constitution.[1] In some States taxes are laid in this form of license or privilege taxation, which in others are levied usually as *ad valorem* taxes upon property, and this applies to corporations, especially that class known as public utility or *quasi* public corporations, including common carriers. The amount of the license fee is sometimes graduated according to amount of earnings, or character of business, or according to capital invested, and in the latter case it does not differ materially, except in name, from *ad valorem* or property taxation. It was natural then that the forms of taxation which were customary in the States should be applied by them in the local taxation of the property and business of the interstate railroad, telegraph and express companies. As the system of taxing the State's interest in the aggregate property of such corporations was not then developed, the privilege or occupation tax seemed the only practical method, where the business transacted might be very large and the property located in the State of trifling value.

§ 207. Osborne v. Mobile.

It is an interesting illustration of the tremendous development of the transportation and commercial interests of the country in recent years, that the decisions of the Supreme Court relating to the right of the State to tax

[1] See *supra*, Chapter IV.

the agencies of interstate commerce, which have been so numerous during the past twenty-five years, really began after the close of the Civil War period. The first case in the Supreme Court on license taxation of an interstate carrier, that is, on the privilege of maintaining an office and doing business in the State, was that of Osborne *v.* Mobile, decided in 1872.[1] An ordinance of the city of Mobile required every express or railroad company doing business in that city to pay an annual license. The fee was graded, so that $500 was charged for a first-class license, where the business extended beyond the limits of the State, $100 for a second-class license for business wholly within the State, and $50 for a third-class license for business wholly within the city. The agent of an interstate express company was convicted of operating his agency without paying his license tax, and this conviction was sustained in the State Supreme Court. The judgment was affirmed by the Supreme Court, Chief Justice Chase delivering the unanimous opinion. He said in part, at page 481: "The difficulty of drawing the line between constitutional and unconstitutional taxation by the State was acknowledged and has always been acknowledged by this court; but that there is such a line is clear, and the court can best discharge its duty by determining in each case on which side the tax complained of is. It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal government in their integrity."

The court said that there was no discrimination in the tax, between the express company and the corporations and citizens of Alabama, because the license was the same for whomsoever the business was transacted; and that, as Congress had never undertaken to exercise its power to

[1] 16 Wallace, 479.

regulate commerce in any manner inconsistent with this municipal ordinance, the right of State taxation was not taken away. The court concluded at page 482: —

"The license tax in the present case was upon a business carried on within the city of Mobile. The business licensed included transportation beyond the limits of the State, or rather the making of contracts, within the State, for such transportation beyond it. It was with reference to this feature of the business that the tax was, in part, imposed; but it was no more a tax upon interstate commerce than a general tax on drayage would be because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State.

"We think it would be going too far so to narrow the limits of State taxation."

§ 208. Osborne v. Mobile overruled.

The decision in Osborne *v.* Mobile was followed by the State courts, which accordingly sustained license taxation, both by the States and municipalities, upon common carriers, for the privilege of conducting their business and maintaining offices within the State or city. They held that there was no interference with interstate commerce where the license was without discrimination as between citizens of the State and non-residents.[1]

About fifteen years later the question came again before the Supreme Court in reference to a license tax levied by the same city upon telegraph companies. The agent of the

[1] Thus, in *Virginia*, W. U. Tel Co. *v.* Richmond, 26 Grattan 1; *Tennessee*, Lightburn *v.* Taxing District of Shelby County, 4 Lea 219, sustaining a privilege tax on a steamboat engaged in interstate commerce; Memphis & L. R. Co. *v.* Dolan, 14 Fed. Rep. 532, where the U. S. Circuit Court in Tennessee sustained a privilege tax on an express company engaged in interstate commerce; and in *Texas*, W. U. Tel. Co. *v.* State, 55 Tex. 314. All of these cases followed Osborne *v.* Mobile.

Western Union Telegraph Company was fined for failing to pay an annual license tax of $225, and the conviction was sustained in the State court, which overruled the defense that the license was an interference with interstate commerce.[1]

But the Supreme Court, in an exhaustive opinion by Justice Bradley, without dissent,[2] held that the ordinance was void, as the tax affected the whole of the company's business, interstate as well as local, and that the business of telegraphing is commerce between the States. The telegraph company was moreover invested with the powers and privileges conferred by the Act of Congress of July 24, 1866, which declared that the erection of telegraph lines should, as against State interference, be free to all who accepted the terms of the act, and that a telegraph company of one State should not, after accepting such terms, be excluded by another from prosecuting its business within her jurisdiction.[3] The decision of the court however was not based upon this Act of Congress, but upon

[1] The State court in its opinion, as quoted at page 644 in the opinion of the Supreme Court, said: —

"We will not gainsay that this license tax was imposed as a revenue measure — as a means of taxing the business, and thus compelling it to aid in supporting the city government. That no revenue for State or municipal purposes can be derived from the agencies or instrumentalities of commerce, no one will contend. The question generally mooted is, how shall this end be attained? In the light of the many adjudications on the subject, the ablest jurists will admit that the line which separates the power from its abuse is sometimes very difficult to trace. No possible good could come from any attempt to collate, explain and harmonize them. We will not attempt it. We confess ourselves unable to draw a distinction between this case and the principle involved in Osborne *v.* Mobile, 16 Wall. 479. In that case the license levy was upheld, and we think it should be in this."

[2] Leloup *v.* Mobile, 127 U. S. 640. Three of the Justices, Bradley, Miller and Field, had concurred in Osborne *v.* Mobile.

[3] As to this Act of Congress see Pensacola Telegraph Co. *v.* W. U. Tel. Co., 96 U. S. 1.

the broad ground that the State could not tax the privilege of transacting interstate commerce. It was said that as the State could not tax interstate commerce, it could not tax the privilege of conducting that commerce.

With reference to the case of Osborne *v.* Mobile, upon which the State court had relied, the court said, page 647, after reciting the terms of the ordinance sustained in that case: "This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States."

And added, l. c. p. 648: —

"A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to refer to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions which have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts."

The conclusion was therefore, l. c. page 648, "that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such

taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress." It was also said that this exemption of interstate and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce located in the State, as it taxes the property of other citizens.

§ 209. License tax on agents of interstate railroads held invalid.

The same principle was applied to license taxes imposed for maintaining offices in which to conduct interstate business. Thus the agent of the New York, Lake Erie & Western Railroad, which extends from Chicago to New York, maintained an office in San Francisco for the purpose of inducing passengers going from that point to New York to take the line of his railroad at Chicago. He was on that account convicted of doing business in San Francisco, in violation of the ordinance of that city requiring the payment of $25 quarterly for a license. The conviction was sustained by the California court, but was reversed by the Supreme Court.[1] It was argued that the soliciting of passengers in California for a railroad running from Chicago to New York, if connected with interstate commerce at all, was so remotely connected with it that the license tax could not be regarded as an interference. But the court said that this distinction was immaterial, for the business was interstate and the tax involved the licensing of the commerce of the road to an extent commensurate with the amount of business done by the agent.

This ruling was followed in the case of the license tax imposed by the State of Pennsylvania upon the Norfolk &

[1] McCall v. California, 136 U. S. 104, Chief Justice Fuller and Justices Brewer and Gray dissenting.

Western Railroad Company,[1] which maintained an office in Philadelphia for the use of its officers and employees, the road being a link in a through line of road by which passengers and freight were carried into the State and from that State into others. The tax was declared invalid, as the office was maintained to meet the necessities of the company's interstate business, and the tax upon it was declared to be upon one of the means and instrumentalities of interstate commerce.

§ 210. Immaterial that license interfering with commerce purports to be for regulation and not for revenue.

The State cannot interfere with interstate commerce by exacting a privilege tax for conducting that commerce, and it is immaterial whether such license is required as a means of police regulation or for purpose of revenue. Thus an act of the State of Kentucky required all agents of foreign express companies, before carrying on business within its jurisdiction, to procure licenses, and preliminary thereto to satisfy the State Auditor that their companies had each an actual capital of not less than a certain amount; so that the license was claimed to be one for regulation, rather than for revenue. The Supreme Court held,[2] reversing the Court of Appeals of Kentucky, that the distinction between a license for regulation and one for revenue was not material, and that the State could enforce such police regulations with reference to the local business of the company, but not as to its interstate business. It said that the decisions of the court clearly established that neither licenses nor

[1] Norfolk & Western R. Co. *v.* Pennsylvania, 136 U. S. 114.

[2] Crutcher *v.* Kentucky, 141 U. S. 47, Chief Justice Fuller and Justice Gray dissenting. See Commonwealth *v.* Smith, 92 Ky. 38, following the above decision and holding void another express company license.

indirect taxation of any kind, nor any system of State taxation, can be imposed upon interstate any more than upon foreign commerce, and that all acts of legislation producing any such result are to that extent unconstitutional and void.

§ 211. License for privilege of transacting local business is valid.

While the State can license the interstate business of common carriers neither by way of regulation nor by way of revenue, it can license both for regulation and revenue the privilege of conducting *local* business, that is, business within the State, though the same company may be engaged at the same office in transacting business beyond the State. Accordingly a Missouri statute imposing a tax upon express companies in proportion to the gross receipts, but only on the receipts for business done within the State, as distinguished from interstate business, was held valid.[1] This was not a license or privilege tax, but the distinction between business within the State and business beyond the State has been applied in cases of license taxation.

Thus a license tax was imposed by the city of Charleston on all persons engaged in any business, trade or profession in that city. The tax was limited by the ordinance to business done exclusively within the city of Charleston, so that it did not include that to or from any points without the city, nor any done for the government of the United States, its officers or agents.[2] It was claimed that the Postal Telegraph & Cable Company was not within the terms of this ordinance, because it did not do any business exclusively within the city of Charleston; that its city offices were merely initial points for sending out messages,

[1] Pacific Express Co. *v.* Seibert, 142 U. S. 339.

[2] Postal Telegraph Cable Co. *v.* Charleston, 153 U. S. 692, Justices Harlan, Brown and Jackson dissenting.

and that if license exactions were allowed to and made by the various cities in the State, great injury and wrong would be done the telegraph company. But the court sustained the license tax, and said that, if hardship resulted, it was not within the power of the court to redress it. The privileges conferred upon the company by the Act of Congress were not inconsistent with the right on the part of a State in which the business was done and the property acquired to tax the same, within the limitations of the Constitution. The court distinguished this case from that of Leloup *v.* Port of Mobile, on the ground that the tax in that case affected the whole business, including that which was interstate.

§ 212. Decision of State court that license only applies to local business conclusive.

The principle was thus established that the State, or municipality acting under the authority of the State, can tax a common carrier, that is, a railroad, telegraph or express company, for the privilege of conducting a local business, but cannot tax an interstate business. Not only is the license held valid, if it is expressly imposed upon the privilege of conducting the local business only, but the decision of the State court that the license is to be construed as thus limited in its application, is conclusive upon the Supreme Court.[1] Thus it was said by the court in a recent case where a license tax was imposed by the State of Florida upon express companies, page 654: "In other words this statute as construed by the Supreme Court of Florida does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is in-

[1] Osborne *v.* Florida, 164 U. S. 650.

terstate in its character, and as to the latter kind of business the statute does not apply to or affect it."

While this distinction is clear enough in theory, it is doubtful whether, but for the qualifications hereafter stated, it would not afford an easy method to the State authorities, if so disposed, of evading the prohibition against interference with interstate commerce. Thus a license tax of say $500 per annum for conducting a railroad or telegraph or express office is invalid, if it is not, by its express terms or by the construction of the State court, limited to the privilege of conducting a local business. But if it is so limited, it will be valid. The common carrier cannot confine himself to interstate business. He must carry on a local business as well, and the local business must be transacted with the same offices and the same facilities as the interstate business.[1]

§ 213. It must clearly appear that intra-state business alone is taxed.

The Circuit Court of Appeals, Fourth Circuit, has said[2] that, in the imposition of such a tax, the interstate business must be distinguished from intra-state business or such discrimination must be made possible, so that it may clearly appear that the intra-state business alone is taxed. In this case an ordinance of the city

[1] Thus the Supreme Court of Nebraska, following Postal Telegraph Cable Co. *v.* Charleston, held valid an ordinance imposing an occupation tax upon railroads having a depot within the city, and exempting from the levy all interstate commerce of such corporation. City of York *v.* C. B. & Q. R. Co., 56 Neb. 572. And the Supreme Court of Alabama, City of Anniston *v.* Southern Railway Co., 112 Ala. 557, held valid an annual license tax of $100 for each main line of railroad to and from other points in the State of Alabama. See also W. U. Tel. Co. *v.* City of Fremont, 43 Neb. 499, and 26 L. R. A. 706; Knoxville & Ohio R. Co. *v.* Harris, 99 Tenn. 684.

[2] Webster *v.* Bell, 15 C. C. A. 360. See also United States Exp. Co. *v.* Hemmingway, 39 Fed. Rep. 60.

of Alexandria, Virginia, exacted a license from every express company having an office in the city and receiving goods, wares and merchandise which it forwarded to points within the State of Virginia, or receiving goods, wares and merchandise within the State of Virginia and delivering them in the city of Alexandria. The court said that this ordinance made no discrimination between business done without and that done within the State, but imposed a tax upon the company, if it had an office in the city and if some of its business was between points in the State of Virginia. It was held that such an ordinance was not valid under the rule laid down in Postal Telegraph Cable Company *v.* Charleston.

A license tax is invalid, even if on its face it purports to charge for intra-state express business only, if its amount is determined by the length of the company's line beyond the State, as it is thus in effect a tax on interstate business.[1] Thus also a license tax on a telegraph company reciting that it is in lieu of an *ad valorem* tax on the property of the company located in the State, but which exceeds the amount which would be levied thereon under the property tax law and makes the payment of either tax a condition precedent to the company's right to do business in the city, is a State regulation of interstate commerce.[2]

§ 214. License must not be condition for transacting interstate business.

License taxation as commonly understood consists in the payment of a tax for the privilege of conducting a business, which but for such license would be unlawful. A license, as the term implies, is the permission of the State to carry on the business, and the payment of the charge exacted

[1] Express Company *v.* Allen, 39 Fed. Rep. 712.

[2] Postal Tel. Cable Co. *v.* Richmond (Va.), 99 Va. 102.

therefor is a condition precedent to the issuance of the license. The State however, in the requirement of a license for the privilege of conducting an *intra*-state business cannot make the payment of the license tax a condition of carrying on the *inter*state business, but must leave the enforcement of this tax to the ordinary means devised for the collection of taxes.[1] This principle applies to any form of taxation upon the property employed in interstate commerce. Thus it was held in the case of the Western Union Telegraph Company *v.* Massachusetts that though the tax imposed was valid, the State could not enforce it by the issuance of an injunction restraining the corporation from prosecuting its business in the State until the taxes were paid.[2]

§ 215. License or privilege tax not exceeding tax on property valid.

Another important qualification of the State's power of license taxation of interstate carriers is that the tax when imposed must not exceed the sum which might be levied directly upon their property according to the general property taxation in that State. A license or privilege tax which is graduated according to the amount and value of the property within the State is in substance and effect therefore a property tax. Thus, in a case from Mississippi, a tax thus imposed was declared[3] to be substantially a tax on property merely, not on the privilege of doing an interstate business. The substance and not the shadow determines whether the power has been validly exercised. The court said, page 695: —

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on

[1] See Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688.
[2] Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530.
[3] Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688.

the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within the State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be levied directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subject to restraint or impediment." [1]

While the court said that a tax thus imposed was not open to objection, it went further and stated that the license would be invalid, if it exacted more than the amount of the tax levied according to the ordinary property taxation. It said, at page 696: "Doubtless no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international

[1] Justices Brewer and Harlan dissented, saying that it was a tax on the privilege of doing within the limits of the State the business of an interstate carrier of telegraph messages; that it was therefore a regulation of interstate commerce, and that this characteristic of the tax was not affected by the question whether the amount was more or less than it would have been if it had been levied on an *ad valorem* basis.

commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."[1]

The principle thus laid down by the court would apply to all license taxation in any locality, whether levied directly by the State or by the municipality acting under State authority. The aggregate tax, in whatever form levied, must not exceed that which would be levied under ordinary property taxation. In other cases the fact that property employed in a business is taxed does not preclude the State from taxing the business at the same time. The rule laid down by the Supreme Court would seem to preclude this form of double taxation upon interstate carriers.

§ 216. Tax on interstate telegraphic messages invalid.

The State of Texas adopted another form of license taxation, by imposing a tax of one cent on every telegraphic message of full rate and one-half cent for every half rate message. The Supreme Court, reversing the Supreme Court of Texas,[2] decided that the law imposing this tax was, as to interstate messages, void, but that it was valid as to business within the State. The decision was placed upon the ground, not only of interference with interstate commerce, but also that the telegraph company, under the Act of Congress, was a government agency, and further that no tax could be levied on messages sent by government officers on the business of the United States.

[1] Citing C. C., etc. Ry. Co. *v.* Backus, 154 U. S. 439, 445, *infra.*

[2] Telegraph Co. *v.* Texas, 105 U. S. 460.

§ 217. Privilege tax on sleeping cars.

Still another form of license or privilege taxation was levied in Tennessee and other States, upon companies leasing sleeping cars, for the privilege of operating them. This privilege tax was held invalid as an interference with interstate commerce, when applied to cars used in the interstate transportation of passengers.[1] The State may however tax the privilege of operating sleeping cars wholly within its limits.[2]

§ 218. Compensation exacted by city for use of poles in streets not regulation of commerce.

A municipality may exact payment by way of reasonable rental for the occupancy of its streets by the poles of a telegraph company, and this is not a license tax on interstate commerce. Thus an ordinance of the city of St. Louis exacted the sum of five dollars *per annum* for each telegraph pole on the streets of the city. This was declared invalid in the United States Circuit Court as a regulation of commerce, but the Supreme Court, reversing the decision of the Circuit Court, sustained the tax,[3] holding that it was not a privilege or license tax, but was in the nature of a charge for the use of property belonging to the city and could properly be called a rental. "A tax," they said, "is a demand of sovereignty; a toll is a demand of proprietorship." It was said however that the reasonableness

[1] Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, overruling Pullman Southern Car Co. *v.* Gaines, 3 Tenn. Ch. 587. The court in its opinion in this case distinguished the case of Wiggins Ferry Co. *v.* East St. Louis, *supra*, by saying that the ferryboats had a *situs* in the State for taxation and that the exaction of a license fee in respect of them was not a regulation of commerce. See *supra*, § 195.

[2] Gibson County *v.* Pullman Southern Car Co., 42 Fed. Rep. 572. See also opinion of Mr. Justice Matthews in Pullman Southern Car Co. *v.* Nolan, 22 Fed. Rep. 276.

[3] St. Louis *v.* Western Union Telegraph Co., 148 U. S. 92.

of the amount charged for the rental must depend upon circumstances, and the case was remanded for a new trial on that issue.[1]

It has since been decided by the United States Circuit Court, in a case from Philadelphia, that the city had no power to impose upon a telegraph company doing interstate business a tax upon its poles and wires in excess of the reasonable expense to the city for the inspection and regulation thereof.[2] But it was for the jury to determine whether the amount was reasonable, and the city had a right to show that additional expense was incurred by it in consequence of the wires suspended in the streets.[3]

§ 219. Payment reserved as bonus in railroad charter not regulation of commerce.

A statute of Maryland granted to the Baltimore and Ohio Railroad the right to build a branch from Baltimore to Washington, and to charge not exceeding $2.50 and in proportion for every shorter distance, providing also that the company should pay the State one-fifth of the whole amount received from transportation of passengers every six months. It was claimed that, under the decision of Crandall *v.* Nevada, *supra*, § 20, this was in effect a tax upon,

[1] On retrial in the Circuit Court, the charge was held unreasonable and excessive.

[2] Philadelphia *v.* Western Union Telegraph Co., 82 Fed. Rep. 797.

[3] Phila. *v.* Atlantic & P. Tel. Co., 42 C. C. A. 325, 3d Circuit; Philadelphia *v.* W. U. Tel. Co., 89 Fed. Rep. 454; Philadelphia *v.* Postal Tel. Cable Co., 21 N. Y. Supp. 556; Philadelphia *v.* W. U. Tel. Co., 40 Fed. R. 615.

This principle was applied in Ohio, Bogart *v.* The State (Com. Pl.), 20 Weekly L. Bul. 458, where a vehicle license tax was sustained, which required owners of vehicles to pay an annual license fee, and provided that the fees be placed to the credit of the street repairing department. The court held that this was not an interference with interstate commerce when enforced against non-resident owners, as it was a compensation for the advantages and improved facilities afforded by the city.

and an interference with, commerce. The court held,[1] opinion by Bradley, J., that it was not a tax upon commerce, but was rather a *bonus* charged by the State in the charter as a consideration for the grant, and was not repugnant to the Constitution. The State itself could have built the road and charged any rate it chose, and it made no difference, from a Constitutional point of view, that it authorized its citizens to build it and reserved for its own use a portion of the earnings. It was simply the exercise by the State of absolute control over its own property and prerogatives. In answer to the suggestion that the public should have a remedy against exorbitant fares and freight exacted by the State lines of transportation, for the bonus would necessarily affect the charge upon the public which the donee of the franchise would be obliged to impose, the court said that the same difficulty is found in exorbitant charges by steamship lines, but that the only remedy is in competition.

§ 220. Taxation of rolling stock.

The taxation of railroad cars, which are continually in transit from State to State, presented a perplexing problem, because it was claimed that they had no taxable *situs* in any of the States wherein they were employed and through which they passed as instruments of interstate commerce. The taxation of the privilege of operating the cars was sought to be enforced for this reason, but was adjudged invalid as a direct interference with interstate commerce.[2] It was claimed that such property had no taxable *situs* ex-

[1] Railroad Co. *v.* Maryland, 21 Wallace, 456. Justice Miller dissented, saying that in his opinion the statute was void under the decision in Crandall *v.* Nevada, *supra*, § 20.

[2] See Pickard *v.* Pullman Southern Car Co., *supra*, § 217.

cept at the terminus of the line, although the cars were continually in transit through that and other States.

The difficulty was finally solved by adopting definitely the principle of taxing the average number of cars in habitual use in the State during the year.

§ 221. Rule of average of habitual use adopted.

The subject of the taxation of rolling stock was first considered by the Supreme Court in the case of the Baltimore & Ohio Railroad, where the judgment of the lower court enjoining the sale of certain engines and cars levied upon by a taxing officer of the State of Virginia was affirmed.[1] The court, although holding that the statute of Virginia did not authorize the particular tax sought to be levied, said, page 123: —

"If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by com-

[1] Marye *v.* Baltimore & Ohio R. R. Co., 127 U. S. 117.

mon carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid."

The principle thus recognized by the court has been applied in a number of cases, particularly with reference to sleeping cars, refrigerator cars and the like, owned by independent companies and leased to railroads.

The State of Pennsylvania imposed a tax on the Pullman Palace Car Company, taking as the basis of the assessment such proportion of the capital of the company as the number of miles of railroad, over which the cars passed in the State of Pennsylvania, bore to the whole number of miles in that and other States over which its cars were run. It was strongly contended that the cars could be taxed only in the State of Illinois, where the car company was organized and had its principal place of business. But the tax was sustained both by the Supreme Court of Pennsylvania[1] and by the Supreme Court of the United States.[2] The latter court said, at page 22: —

"No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly

[1] 107 Pennsylvania, 156.

[2] Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18.

of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in the amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used."

§ 222. Supreme Court on taxable situs of railroad cars.

In answer to the argument that the rule ought to be the same as that applicable to vessels, which are only taxable at the home port, the court replied that there is an obvious distinction between the case of vessels, and that of cars which have no fixed *situs* and traverse the land only, continuing at page 24: —

"No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land."

The court said, after reviewing the cases, that this was neither a license nor a privilege tax, nor a tax on the business or occupation, nor yet a tax on, or because of, the transportation or the right of transit of persons or property through the State to other States or countries. It

was imposed equally on foreign and domestic companies. A tax on the capital of a corporation, on account of its property within the State, is, in substance and effect, a tax on that property. The court added, with reference to the jurisdiction of the State in taxation, pp. 25, 26: —

"The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within it borders. The route over which the cars traveled extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

"The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon

which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more."

And the court concluded, p. 29: —

"For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its situs at the owner's domicil, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether."[1]

[1] Strong dissent was made by Justice Bradley, with whom concurred Justices Field and Harlan. He said, l. c. page 30: —

"Certainly property merely carried through a State cannot be taxed by the State. Such a tax would be a duty — which a State cannot impose. If a drove of cattle is driven through Pennsylvania from Illinois to New York, for the purpose of being sold in New York, whilst in Pennsylvania it may be subject to the police regulations of the State but it is not subject to taxation there. It is not generally subject to the laws of the State as other property is. So if a train of cars starts at Cincinnati for New York and passes through Pennsylvania, it may be subject to the police regulations of that State whilst within it, but it would be repugnant to the Constitution of the United States to tax it. We have decided this very question in the case of State Freight Tax, 15 Wall. 232. The point was directly raised and decided that property on its passage through a State in the course of interstate commerce cannot be taxed by the State, because taxation is incidentally regulation, and a State cannot regulate interstate commerce. The same doctrine was recognized in Coe v. Errol, 116 U. S. 517."

§ 223. **Taxation of refrigerator cars.**

This principle has been followed in other cases. Thus a tax levied on this same basis of the average number in habitual use in the State, was sustained in the case of the cars of the American Refrigerator Transit Company in the State of Colorado. It was claimed that the cars had no *situs* for taxation in the State, because the company was an Iowa corporation and had no office or place of business in Colorado. The average number of cars used in the State was forty. The tax was affirmed both in the State court and in the Supreme Court,[1] the latter saying, l. c. p. 81: —

"It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ a portion of its movable personal property, it is legitimate for the latter to impose upon such property,

After reviewing other decisions, he insisted that, although such cars are not to be free from taxation, any more than ships, yet they are not taxable by the States in which they are only transiently present in carrying on their commercial operations. He said, at page 33: —

"In the opinion of the court it is suggested that if all the States should adopt as equitable a rule of proportioning the taxes on the Pullman company as that adopted by Pennsylvania, a just system of taxation of the whole capital stock of the company would be the result. Yes, if — ! But Illinois may tax the company on its whole capital stock. Where would be the equity then? This, however, is a consideration that cannot be compared with the question as to the power to tax at all, — as to the relative power of the State and general governments over the regulation of internal commerce,— as to the right of the States to resume those powers which have been vested in the government of the United States."

See also Pullman's Car Co. *v.* Hayward, 141 U. S. 36, sustaining the property tax upon railroad cars levied upon the same principle of the average number in habitual use, the tax being apportioned to the counties of the State on the mileage basis.

[1] American Refrigerator Transit Co. *v.* Hall, 174 U. S. 70; Union Refrigerator Transit Co. *v.* Lynch, 177 U. S. 149, applying the same rule in the case of the taxation of cars of a Kentucky corporation in Utah. See also Pullman's Palace Car Co. *v.* Twombley, 29 Fed. Rep. 658, opinion by Brewer, J., holding valid the Iowa statute; also Board of Assessors *v.* Pullman's Palace Car Co., 8 C. C. A. 490.

thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

§ 224. Mileage apportionment in taxation of rolling stock.

In the application of this rule of average of habitual use to the taxation of sleeping cars and other forms of rolling stock, there was necessarily involved the recognition of the principle of mileage apportionment as between the different States in the railway system. The same principle has been applied in different State systems of taxation of such property. The total assessed value of the average number of cars in habitual use in the State having been ascertained, this amount is apportioned to the different counties or cities along the line of the railroad in the State. This has been held a valid method of taxation, both by the State and Federal courts, see *infra*, § 239 *et seq.*[1]

§ 225. State tax on freight invalid.

The taxation of corporations on the basis of their gross receipts, having the advantage of simplicity and efficiency and being in effect a corporation income tax, has been adopted in many States with reference to domestic corpora-

[1] For decision of a State court holding that cars of the Armour Packing Company have a taxable *situs* only at the domicil of the corporation owning the cars, see State ex rel. *v.* Stephens, 146 Mo. 662.

tions, particularly when engaged in *quasi* public business. The application of this principle to interstate corporations however encountered the difficulty, that the taxation of the receipts of interstate commerce is in effect taxing interstate commerce itself, and thus placing the conduct of it under State control.

The difficulty was illustrated in two cases decided in 1872, both from Pennsylvania, one known as the State Freight Tax Case, and the other as the State Tax on Railway Gross Receipts. In the former,[1] a tax levied by the State of Pennsylvania upon the freight carried by railroads into or from or through the State, at the rate of a definite sum upon each ton of freight, was declared void as an interference with interstate commerce. The court said that commerce, as used in the Constitution, includes not only traffic but intercourse and navigation, and that, if the State could tax a ton of freight at all, it could tax it so heavily as would make interchange of commodities between the States impossible.

§ 226. State tax on railway gross receipts.

In the other case, a tax of three-fourths of one per cent, levied by the State of Pennsylvania upon the gross earnings of every railroad incorporated under its laws and not liable to an income tax under existing laws, was adjudged valid. In that case the tax was resisted by the Philadelphia & Reading Railroad Company, a Pennsylvania corporation whose road lay between Philadelphia and the coal regions of the State. This company claimed that a large source of its profit was derived from the transportation of coal to places from which most of it went to States other than Pennsylvania. But the court said[2] that this case was to be distin-

[1] 15 Wallace, 232, Justices Swayne and Davis dissenting.
[2] 15 Wallace, 284, Justices Miller, Field and Hunt dissenting.

guished from that of the State freight tax. It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution. The States have authority to tax the assets, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property belonging to natural persons, and to the same extent. The court said further, at page 293: —

"We think also that such tax may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise."

The court said that, when the tax was laid upon gross receipts, these receipts had lost their distinctive character as freight by becoming incorporated into the general mass of the company's property, l. c. page 295: —

"There certainly is a line which separates that power of the Federal government to regulate commerce among the States, which is exclusive, from the authority of the States to tax persons' property, business, or occupations, within their limits. The line is sometimes difficult to define with distinctness. It is so in the present case; but we think it may safely be laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between States, have become subject to legitimate taxation."

It seems to have been conceded that a State can levy a tax upon net earnings, and the court said that it is difficult to state any well-founded distinction between a State tax upon net earnings and one upon gross earnings, that net

earnings are a part of the gross receipts, and that the gross receipts are a measure of approximate value.

Neither of these cases has been overruled; but the authority of the decision in the case of the State Tax on Gross Receipts was for a time seriously impaired by decisions of the court apparently inconsistent with the broad statement therein of the right to tax gross receipts, on the ground that they have passed into the treasury of the company and lost their distinctive character as freight.[1]

It will be noticed that the mileage rule of apportionment of interstate properties was not suggested or considered in the case of the State Tax on Gross Receipts. The case presented was that of a railroad whose line was entirely within the State, but which did an interstate business through its connections with other lines leading out of the State.

§ 227. Mileage apportionment in interstate railway taxation.

In a later case, which seems to have been the first case before the Supreme Court involving the taxation of an interstate railroad[2] as such, the court sustained the tax levied by the State of Delaware upon the Philadelphia, Wilmington & Baltimore Railroad Company, a through line connecting the cities of Baltimore and Philadelphia, of which that part in Delaware had been built by a Delaware corporation, which had been consolidated with the corporations in the other States of Pennsylvania and Maryland. The act provided that a tax of one-fourth of one per cent should be levied upon the actual cash value of every share of the capital stock of all railroad and canal companies,

[1] See Steamship Co. *v.* Pennsylvania, 122 U. S. 326; Fargo *v.* Michigan, 121 U. S. 230.

[2] Delaware Railroad Tax, 18 Wallace, 206, decided in 1873.

provided however that, in the case of an interstate railroad, the company should only be required to pay the tax on such part of the shares of its capital stock as should be in that proportion to the whole number of shares, which the length of the road within the State should bear to the whole length. It was claimed that this was an attempted taxation of property beyond the jurisdiction of the State, and that there was no relation between the capital invested and the number of shares of the company owned in the State. But the court replied that the tax was not upon the shares, nor upon the property of the corporation, but a tax upon the corporation, measured by a percentage upon the cash value of a certain proportional part of the shares, and that, although the rule was arbitrary, it was approximately just, and one which the legislature had the right to adopt. It said, at page 231: —

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

§ 228. Taxation of net earnings sustained.

A tax of three per cent was also levied under this act upon the net earnings of the company, or the income received from all sources during the preceding year, and this also was adjusted on the mileage rule, such shares only of the net earnings being subject to the tax as were in the proportion to the whole net earnings which the length of the road within the State bore to the whole length. As to this the court said, p. 231: —

"Nothing was urged in the argument specially against the tax upon the corporation under the first section of the act, which is determined by the net earnings or income of

the company. Whatever objections could be presented were answered by the observations already made upon the tax under the other section. A tax upon a corporation may be proportioned to the income received as well as to the value of the franchise granted or the property possessed."

§ 229. **Tax on gross earnings held invalid.**

A series of cases followed which held State taxes levied upon gross earnings of transportation and telegraph companies invalid. These cases did not expressly overrule the case of the State Tax on Gross Receipts, *supra*, § 226, but seem clearly inconsistent with the principle on which it was based, that the receipts from freight could be taxed, while the freight itself could not be taxed. This distinction was directly denied.

Thus, in 1887, an act of Pennsylvania imposing a tax upon the gross receipts of railroad, canal, steamboat and other transportation companies was held invalid as to a steamship company, a Pennsylvania corporation, operating steamers between the ports of Philadelphia and Savannah and in foreign trade out of New Orleans.[1] The court after holding that the interstate commerce carried on by ships on the sea is national in its character admitting of only one uniform system, said, Justice Bradley delivering the unanimous opinion, at page 336: —

"If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the State cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any

[1] Philadelphia Steamship Co. *v.* Pennsylvania, 122 U. S. 326.

difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

The court commented at length upon the cases of the State Freight Tax and the State Tax on Railway Gross Receipts, *supra*, § 225 *et seq.*, and said that if the former stood alone it would control this case. It was said further that the first ground on which the decision of the State Tax on Gross Receipts was placed was not tenable, that is, that the receipts from freight had been collected into the treasury of the company and were no longer distinguishable as receipts. The opinion proceeds, at page 342: —

"No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in State Tax on Railway Gross Receipts was placed is not tenable; that it is not supported by anything decided in Brown *v.* Maryland; but, on the contrary, that the reasoning in that case is decidedly against it."

It was intimated however that the decision in the Rail-

way Gross Receipts Case could be based upon the second ground stated in the opinion therein, to wit, that it was a tax on the franchise of the corporation. But that consideration was inapplicable to the case of the steamship company. The court declared that the tax was not an income tax, as it was not levied on the incomes of all the inhabitants of the State, but was a special tax levied on the transportation companies.

At the previous term, the court had held invalid a tax levied by the State of Michigan upon the gross receipts of the Merchants Dispatch Transportation Company.[1] The cars in that case were owned by the transportation company and leased to the railroads, which operated them. The company was a New York corporation, and the tax finally assessed against it was for the gross receipts, which it had returned as the money received from the transportation of freight from points without to points within the State, and from points within to points without. No tax was levied upon the amount received for transportation passing entirely through the State to and from without. The court said there was nothing in the statute on which to base this distinction, and therefore it must have been made upon some idea of the authorities of the State that the one was interstate commerce and the other was not, which the court was at a loss to comprehend, as there was no such difference. It would seem from the statement of facts that the tax was apportioned according to the mileage in the State, but this was not pressed by counsel nor considered by the court. The opinion was by Justice Miller, who had dissented from the decision in the State Tax on Railway Gross Receipts Case, on which the Supreme Court of Michigan had relied in sustaining this tax. He distinguished that case, first because the subject of taxation

[1] Fargo *v.* Michigan, 121 U. S. 230.

there was a Pennsylvania corporation having the *situs* of its business within the State; and secondly, upon the ground that the assessment there was upon money in the treasury of the company, while in the case at bar the money received for freight probably never was within the State, being paid to the company either at the beginning or end of its route.

In 1888 a tax levied by Ohio upon the gross receipts of the Western Union Telegraph Company was held valid as to the receipts from business within the State, but invalid as to those from interstate business, and the court therefore sustained an injunction against the collection of taxes upon the latter.[1] In this case moreover there seems to have been no effort to apportion the receipts according to the mileage in the State, and the tax was directly upon the receipts in Ohio of the company's business, and not upon the gross receipts of all its business. The court, in its opinion, refers to the fact that at the same term it had sustained a tax levied by the State of Massachusetts upon the capital stock of the company, the ratio allotted being the ratio of the mileage in the State to the total number of miles of the company's lines in the United States.[2]

§ 230. Tax on gross receipts held invalid in State courts.

These cases were considered as impairing the authority of the State Tax on Gross Receipts Case, and the State courts followed in holding that method of taxation unconstitutional, as to that part of the receipts coming from interstate commerce.

Thus the Supreme Court of Vermont[3] admitted that the

[1] Ratterman *v.* Western Union Tel. Co., 127 U. S. 411; Western Union Telegraph Co. *v.* Alabama, 132 U. S. 472.

[2] Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, *infra*, § 249.

[3] Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co., 63 Vt. 1, 10 L. R. A. 565.

effect of the decision in Philadelphia Steamship Co. *v.* Pennsylvania, *supra*, § 229, was to overrule the State Tax on Gross Receipts Case and make the law of Vermont taxing gross receipts unconstitutional as to those derived from interstate commerce, saying: —

"We as judges of a State court are bound by the very language of the Federal Constitution to accept the construction of any part of that Constitution made by the Supreme Court; and in this case the reasoning of that court seems to us to be entirely unanswerable. We hold, therefore, that our corporation tax law, so far as it seeks to tax the earnings derived from interstate commerce, is unconstitutional, as it interferes with commerce, the regulation of which is within the exclusive control of Congress." [1]

§ 231. Maine v. Grand Trunk R. R. Co.

But, a few years later, in 1891, the right of a State to levy a tax upon that portion of all the gross earnings of an interstate railroad apportioned to the total earnings, as the mileage in the State is proportioned to the total mileage, when levied as an excise or franchise tax upon the corporation, was distinctly sustained by the Supreme Court.[2] Such a tax was levied by the State of Maine upon the Grand Trunk Railroad Company, a Canada corporation, which had leased a railroad in Maine and operated it and used its franchises under legislative permission. Under the statute the lessee was required to pay annually what was entitled an

[1] The court however held that the lessee of a railroad could not be compelled to pay to the lessor the amount of such tax thus adjudged unconstitutional which it had paid to the State under its covenant to pay taxes and accordingly withheld from its rent, although notified by the lessor not to pay them, as the taxes when paid were lawful. On appeal the Supreme Court dismissed the case for the want of jurisdiction, 159 U. S. 639, no Federal question being involved as between the parties.

[2] Maine *v.* Grand Trunk R. R. Co., 142 U. S. 217.

excise tax for the privilege of exercising its franchise in the State. The amount of this tax was calculated upon the gross receipts for the preceding year on the mileage basis. The gross receipts of the whole system within and without the State were divided by the total number of miles operated, and, the average gross receipts per mile having been thus obtained, this amount was multiplied by the number of miles in Maine and the tax computed upon the result. The case was submitted to the court upon the distinct issue of the right of the State to levy such a tax. The U. S. Circuit Court had held the tax invalid on the ground that the State Tax on Gross Receipts Case had been overruled.[1]

The opinion was delivered by Justice Field, reversing the court below and holding the tax valid. He said, pp. 227 and 228: —

§ 232. Tax on gross earnings, apportioned by mileage, valid as excise tax.

"The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of a State to levy there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings or to deal in special commodities, or to exercise particular franchises.[2] It is used more frequently, in this

[1] The reported brief of Mr. Littlefield, Attorney-General, contains a clear analysis of the cases theretofore decided and the issue submitted to the court.

[2] For construction of the term "excise" in Federal taxation see *infra*, § 485.

country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed.''

The opinion further said that the Circuit Court erred in holding that the tax was upon the receipts as such, and therefore an interference with interstate and foreign commerce. The resort to the receipts was simply to ascertain the value of the business done by the company; and the effect was the same as if the reference had been to results of former years. There was no levy, by the statute, on the receipts themselves, either in form or fact, as they constituted simply the means of ascertaining the value of the privilege conferred.

The court also said that the case of the Philadelphia Steamship Co. *v.* Pennsylvania[1] in no way conflicted with that decision.[2]

§ 233. **Principle reaffirmed.**

The principle thus established, that the gross receipts of an interstate carrier may be taxed by the State when the tax is levied as an excise or franchise tax, and apportioned

[1] *Supra*, Sec. 229.

[2] Four judges concurred with Justice Field in this opinion, Chief Justice Fuller, and Justices Gray, Blatchford and Brewer, while four judges dissented, Justices Bradley, Harlan, Lamar and Brown. The dissenting opinion by Justice Bradley was the last reported opinion of that distinguished jurist. In it he said: "This court and some of the State courts have gone a great length in sustaining various forms of taxes upon corporations. The train of reasoning upon which it is founded may be questionable. A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter; for its franchises; for the privilege of carrying on its business; it may be taxed on its capital; and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company. I do not know that jealousy of corporate institutions could be carried much further. This court held that the taxation of the capital stock of the Western Union Telegraph Company in Massachusetts, graduated according to the mileage of lines in that State compared with the lines in all the States, was nothing but a taxation upon the property of the company; yet it was in terms a tax upon its capital stock, and might as well have been a tax upon its gross receipts. By the present decision it is held that taxation may be imposed upon the gross receipts of the company for the exercise of its franchise within the State, if graduated according to the number of miles that the road runs in the State. Then it comes to this: A State may tax a railroad company upon its gross receipts in proportion to the number of miles run within the State, as a tax on its property; and may also lay a tax upon these same gross receipts, in proportion to the same number of miles, for the privilege of exercising its franchise in the State! I do not know what else it may not tax the gross receipts for. If the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct."

on the basis of the mileage within the State to the total mileage, has been distinctly reaffirmed.[1]

Thus the court in Erie R. R. Co. *v.* Pennsylvania reaffirmed the case of Maine *v.* Grand Trunk Railway and sustained a tax of Pennsylvania which it was claimed was improperly levied upon tolls received by a New York railroad company from other railroad companies for the use by them of so much of its railroad tracks as lay in the State of Pennsylvania. It said, at page 438: —

"The tax complained of is not laid on the transportation of the subjects of interstate commerce, or on receipts derived therefrom, or on the occupation or business of carrying it on. It is a tax laid upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received. The State has not sought to interfere with the agreement between the contracting parties in the matter of establishing the tolls. Their power to fix the terms upon which the one company may grant to the other the right to use its road is not denied or in anyway controlled.

"It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burden on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance." [2]

[1] New York, Lake Erie and Western R. R. Co. *v.* Pennsylvania, 158 U. S. 431; Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192. In the latter case the tax was upon the gross receipts, but it was held that the railroad running between two points in Pennsylvania and traversing only a short distance in New Jersey was not engaged in interstate commerce, because the incidental passage through another State in a continuous carriage from one point in a State to another point in the same State is not interstate commerce.

[2] See Cumberland & Penn. R. R. Co. *v.* Maryland, 92 Md. 668, and 52 L. R. A. 764, following Maine *v.* Grand Trunk R. R. Co., and carefully reviewing the decisions of the Supreme Court.

§ 234. Immaterial whether corporation is domestic or foreign.

In the case of Maine *v.* Grand Trunk Railway Company, the defendant was a foreign corporation organized under the laws of Canada, but its railroad in Maine had been constructed by another corporation under a Maine charter, and was operated by defendant under lease. The decision of the court however was not based upon any distinction between the status of a domestic and that of a foreign corporation. It said that the granting of the privilege to operate in the State as a corporation, whether the corporation be of domestic or foreign origin, rests entirely within the discretion of the State. Obviously this expression was used in the sense, not that the State can prohibit the corporation engaged in interstate commerce from operating in the State, but that, whether the corporation be domestic or foreign, the State has the right to tax the corporate franchise upon the basis of an apportionment to the receipts of the business.

The rule as laid down therefore in Maine *v.* Grand Trunk Railroad Company, *supra*, § 231, would seem to be equally applicable to foreign and domestic corporations. The difference between foreign and domestic corporations was discussed in Fargo *v.* Michigan, *supra*, § 229, as constituting the distinction between that case, which involved a foreign corporation, and the case of the State Tax on Gross Receipts, in which the corporation was domestic.[1]

§ 235. Tax not upon receipts as such, but excise tax apportioned to receipts.

The decisions, *supra*, § 229, holding that a tax cannot be levied upon gross receipts as such have not been over-

[1] In Tide Water Pipe Co. *v.* Assessors, 57 N. J. L. 516, the rule was applied in sustaining a tax upon part of the gross receipts of a foreign pipe line company proportioned to the mileage in the State, the tax being levied as a franchise tax for the privilege of doing business in the State.

ruled in terms and it would seem that, though the distinction seems one more in name than in substance, the tax must be levied as an *excise* tax apportioned to receipts and not directly upon receipts.

The question does not seem to have been raised or considered, in relation to a tax upon earnings, whether the railroad company would be allowed to show in any particular case that the operation of the mileage rule of apportionment would work injustice by enabling the State to tax an undue proportion of earnings. Such a case might well occur where the portion of a company's line in one State traversing a very populous district would be far more productive of earnings than the same mileage in another State. As will be seen hereafter, this consideration has been recognized by the courts with reference to the mileage rule of apportionment in property valuation.

§ 236. State tax on net receipts.

The same considerations that are applicable to a tax upon gross receipts apply to one levied upon net receipts. The latter, being the proceeds from the treasury of the corporation after paying all expenses of management and operation, are clearly distinguishable from transportation receipts, even if gross receipts are not, and this seems to have been conceded in the cases wherein that distinction was discussed.[1] Either gross receipts or net receipts may therefore in the discretion of the State be taken as the basis for calculating the value of the privilege granted the corporation under its statutes, when the State seeks to determine the amount of an excise tax to be paid therefor by the corporation, whether domestic or foreign. This privilege, it should be remembered, is not that of transacting interstate commerce as

[1] See opinion in State Tax on Railway Gross Receipts, *supra*, § 226; also Delaware Railroad Tax, *supra*, § 227.

such, but that of operating as a corporation under the laws of the State.

§ 237. Valuation of property by capitalization of receipts.

The right to tax receipts, whether gross or net, must be distinguished from using the receipts or income of the corporation by capitalizing the same as a means of determining the valuation of the property tax. It is the same distinction that there is between levying a tax upon the rental and upon the value of the property from which the rental is paid, determining the valuation of the property by capitalizing the rental.[1]

[1] See *infra*, § 477.

CHAPTER VIII.

VALUATION OF INTERSTATE PROPERTIES FOR TAXATION.

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§ 238. **Right of property taxation conceded.**

The difficulty in adjusting a tax rate on earnings so as to secure equality of taxation under a system of general property taxation has led to a general adoption of the system of taxing interstate properties by an *ad valorem* property valuation.[1] It has been uniformly declared that while the States cannot interfere by taxation or otherwise with the conduct of interstate commerce or tax the privilege as such of conducting such commerce, they can tax the property employed therein in the State on the same basis that they tax other property. No question can arise therefore as to the power of the State to tax the tangible property in its jurisdiction of a railroad, telegraph or other company engaged in interstate commerce. Thus the roadbeds and station houses of a railroad, the telegraph poles, wires and offices of a telegraph company, the express wagons and delivery offices of an express company may all be assessed like other property of the same class and subject to the same taxation.

The difficulty however has been found in determining what portion of the intangible property of such interstate corporation can be located within the State so as to be subject to its taxing power.

§ 239. **Unit rule.**

Before the question was presented to the Supreme Court in relation to the taxation of interstate properties, it had arisen in some of the States in reference to the taxation of such properties within the State. There was established in some of the States, with reference to the valuation of intra-state railroads, the so-called unit rule or rule of entirety, to wit, the valuation of a railroad in a State for

[1] In Michigan, by constitutional amendment, the property taxation of railroads was adopted recently in place of taxation upon gross earnings.

taxation as an entirety and the apportionment of the entire value thus ascertained to the different counties or municipalities in the State traversed by the railroad, according to the proportionate mileage therein. This so-called unit rule in fact therefore provided for the valuation of such properties by the central power of the entire State, in place of local valuation of that part of the railroad or telegraph system in each county by the officials thereof. This system was established about the same time in both Missouri and Illinois and was sustained by the State courts of both States. The system of unit valuation, particularly the mileage apportionment, was strongly opposed on the ground that it discriminated against communities like large cities, where terminal systems were of great value as compared with the same mileage of roadbed in a thinly populated county. But it was held that it was competent for the legislature to adopt that method of apportionment, both as to the roadbed and rolling stock of a railroad.[1]

§ 240. Illinois railroad cases.

The Illinois system of unit valuation and mileage apportionment within the State, there being apparently no question as to the valuation of interstate properties, was considered by the Supreme Court on appeal from the United States Circuit Court in what are known as the State Railroad Tax Cases, in 1875.[2] It seems that when the opinion was delivered, the points raised in the case had already been decided in favor of the State by the Supreme Court of Illinois, and it was said in the opinion that, as the whole matter concerned the validity of State law, which was not seriously questioned on the ground of any conflict with the

[1] See State ex rel. *v.* Severance, 55 Mo. 378; Porter *v.* Railroad Co., 76 Ill. 561. See also Kentucky R. R. Case, 115 U. S. 331.

[2] 92 U. S. 575.

Constitution of the United States, the decision of the State court was to be accepted as the rule of decision.[1] The court however discussed the system enforced by the State Board of Equalization, charged with the duty of valuing the railroad property, and the judgment of the Circuit Court enjoining the collection of the tax was reversed.

It seems that, according to the Illinois rule, the local tangible property of the companies, other than their roadbed and rolling stock, was assessed in the county or city where located, like other property, by the local authorities; while the railroad track, rolling stock and other property not local and the franchises of the company were treated as a unit for taxation, and the valuation thereof, when ascertained, was distributed among the counties through which the road passed, according to the mileage apportionment. The board adopted rules of valuation as follows, l. c. page 587: —

"*First*. The market or fair cash value of the shares of capital stock, and the market or fair cash value of the debt (excluding from such debt the indebtedness for current expenses), shall be combined or added together; and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchise, respectively, of such companies and associations.

"*Second*. From the aggregate amount ascertained as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property, respectively, of such companies and associations (such equalized or assessed valuation being taken, in each case, as the same may be determined by the equalization or assessment of property by this board); and the amount remaining in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, includ-

[1] 92 U. S. 617.

ing the franchise, which this board is required by law to assess, respectively, against companies and associations now or hereafter created under the laws of this State."

The court said, opinion by Justice Miller, as to this method of valuation, that the value of railroad bonds in the market is one of the truest criteria, as far as it goes, of the value of the road as a security for the payment of those bonds. Justice Miller proceeded, l. c. p. 605: —

"It is therefore obvious, that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock." [1]

He added that this would be perhaps the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt, but that this was not the case. The system adopted by the statute of Illinois and the rule of the board preserved the principle of taxing all the tangible property at its value, and then taxing the capital, stock and franchise at their value, if there was any, after deducting the value of the tangible property.

[1] But held in Pullman's Palace Car Co. *v.* Transportation Co., 171 U. S. 138, that the market value of stock of a manufacturing company is not a proper measure of the value of the property in accounting for the value thereof, as other considerations, speculative and otherwise, not affecting the value of the property, may enter into the market value of the shares. See also Railroad and Telephone Companies *v.* State Board of Equalizers of Tennessee, 85 Fed. 302, where it was said that notwithstanding anything that may be said in the judicial decisions and legislative enactments, "no more uncertain or delusive element in the attempt to fix values was ever resorted to than this stock and bond basis."

§ 241. **Supreme Court on situs of railroad property.**

In answer to the objection that the personal property had a *situs* at the principal place of business of the corporation and should be taxed there, the court said, p. 607:—

"This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicile of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. Green v. Van Buskirk, 5 Wall. 312. Like all other laws of a State, it is, therefore, subject to legislative repeal, modification, or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation."

Objection was made to the assessment of the value as a unit and the distribution according to mileage, and it was said by the court: —

§ 242. **Supreme Court on apportionment.**

"This, it is said, works injustice both to the counties and to the companies. To the counties and cities, by depriving them of the benefit of this value as a basis of local taxation; to the company, by subjecting its track and franchises, on the basis of this general value, to the taxation of the counties and towns, varying, as they do, in rate, without the benefit of the rule of assessment which prevails in those counties in the valuation of other and similar property. But, as we have already said, a railroad must be

regarded for many, indeed for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and, except in its use as one track, is of little value. In this track as a whole each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy by any means a few miles of this track within an interior county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place where its largest traffic centers. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

§ 243. Application of unit rule to interstate railroads.

About ten years later, in the Kentucky Railroad Tax Cases,[1] the Kentucky statute for the valuation of railroad property by a State board under the mileage rule of apportionment of interstate property was sustained as not violating the Fourteenth Amendment. But apparently the question was not raised, whether the State's valuation of property outside of its jurisdiction constituted interference with interstate commerce.

The application of these principles to the valuation by a State board of interstate railroads was presented to the court nearly twenty years after the decision of the State

[1] 115 U. S. 321.

Railroad Tax Cases in the Indiana Railroad Cases,[1] where the subject was very fully considered. The Indiana statute of 1891 provided for the assessment of railroad property by a State board, which should act upon the reports of the railroad companies showing the length of track in each county, the total amount of rolling stock, the capital stock, market value, and so on.

The court said that it was concluded by the decision of the Supreme Court of Indiana, that the method of assessment was authorized by the constitution of that State, and the validity of the statute under the Federal Constitution was really established by its own decisions in the State Railroad Tax Cases and Kentucky Railroad Tax Cases, *supra*. It was strongly contended that the statute permitted and required the assessment and valuation of property outside of the State, and this argument was based upon the requirement that a statement of the amount of the capital stock and the indebtedness of the railroad should be returned to the State Auditor. But the court held that the board had a right to this information for determining the value of the property within the State, saying, page 430: —

§ 244. Supreme Court on mileage apportionment in interstate railroads.

"When a road runs through two States, it is, as seen, helpful in determining the value of that part within one State to know the value of the road as a whole. It is not stated in this statute that when the value of a road running in two States is ascertained the value of that in the State of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for

[1] Pittsburg, etc., R. R. Co. *v.* Backus, 154 U. S. 421; and C. C. C. & St. Louis R. R. Co. *v.* Backus, 154 U. S. 439.

consideration by the State board. Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair."

§ 245. Exceptional circumstances may make mileage rule inapplicable.

The same difficulty which was suggested in relation to the mileage rule of apportionment within a State applies in a greater degree to that rule as applied to an interstate road. It was admitted by the Supreme Court in these Indiana cases that exceptional circumstances may exist, and it is right that an assessing board should consider them; but it will be presumed that, if evidence of such circumstances was offered, it was taken into account, and that the board gave due weight to it before finally fixing the assessed valuation of the property within the State. Thus it was said in one of the cases, at page 431: —

"It is true, there may be exceptional cases, and the testimony offered on the trial of this case in the Circuit Court tends to show that the plaintiff's road is one of such exceptional cases, as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the State board, it must be assumed, in the absence of anything to the contrary that such board, in making the assessment of

track and rolling stock within the State, took into account the peculiar and large value of such facilities and such extra rolling stock. But whether in any particular case such matters are taken into consideration by the assessing board does not make against the validity of the law, because it does not require that the valuation of the property within the State shall be absolutely determined upon a mileage basis.

"Our conclusion, therefore, is that this act is not obnoxious to any of the constitutional objections made to it."

In this case the court sustained the assessment, although admitting that "a shadow had been cast upon the action of the board," in that the valuation had been increased from $8,538,053.00 in 1890 to $22,666,470.00 in 1891.

§ 246. Rulings on testimony not reviewed in Supreme Court unless bearing on Federal question.

In another one of the Indiana Railroad Tax Cases a special effort was made to show that the State board had included in its assessment the value of property outside of the State, and that the valuation placed upon the property in the State was largely upon interstate business done by the plaintiff, thus, it was claimed, placing a direct burden upon interstate commerce. It appeared that the trial court had ruled out the testimony offered as to the elements the members of the board considered in making their valuation, but there was evidence that no franchise belonging to the plaintiff was estimated in making the assessment. The Supreme Court, Justice Brewer delivering the opinion, said, at page 443, that it is not within the province of the court to review any question as to the admission or rejection of testimony which does not bear directly upon some matter of a Federal nature, and that, under the record, the inquiry was narrowed to these two matters:

§ 247. Entire property may be considered in valuation of portion within State.

"First, if an assessing board, seeking to assess for purposes of taxation a part of a road within a State, the other part of which is in an adjoining State, ascertains the value of the whole line as a single property and then determines the value of that within the State, upon the mileage basis, is that a valuation of property outside of the State, and must the assessing board, in order to keep within the limits of State jurisdiction, treat the part of the road within the State as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it, if operated separately from the balance of the road? Second. Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a State forming part of a line of road running into another State, and assesses those miles of road at their actual cash value determined on a mileage basis, is this placing a burden upon interstate commerce, beyond the power of the State, simply because the value of that railroad as a whole is created partly — and perhaps largely — by the interstate commerce which it is doing?"

"With regard to the first question, it is assumed that no special circumstances exist to distinguish between the conditions in the two States, such as terminal facilities of enormous value in one and not in the other. With this assumption the first question must be answered in the negative. The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its

mileage proportion of that flowing from a continuous and connected operation of the whole."

The court illustrated this increase of value from combination by showing the effect of the New York Central Consolidation, where it was observed that the value of the property immediately upon the consolidation was recognized in the market as largely in excess of the value of the separate properties. It was unnecessary to inquire into the cause of this increase in value. It was enough to notice the fact. The State was entitled to tax its proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. The opinion continued: —

"The question is, how can equity be secured between the States, and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing property outside of the State."

"The second question must also be answered in the negative. It has been again and again said by this court that while no State could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce."

§ 248. Value of property in use may be considered in valuation.

As to the basis of property taxation, it was said, page 445: —

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that

use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value, it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible — at least in respect to railroad property — to divide its value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the State. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt."

The court added: —

"It is enough for the State that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by State laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the State." [1]

§ 249. Unit and mileage rule as applied to taxation of telegraph companies.

In two successive cases from Massachusetts and one from

[1] Justice Harlan, with whom concurred Justice Brown, dissented in these cases, saying that the statute as construed by the Supreme Court of the State imposed illegal burdens upon interstate commerce, under the guise of valuation for purposes of taxation of property within the State.

Indiana,[1] the Supreme Court sustained the taxation of the Western Union Telegraph Company under the mileage rule of apportionment, that is, by taking as a basis of assessment such portion of the total capital stock of the company as equaled the ratio of the company's mileage within the State to its total mileage. It was strongly contended that telegraph companies are government agencies and so not taxable by State authority, and that therefore such portion of the Western Union lines as was located on roads declared post roads by Congress was exempt. But the court said in the case first cited, page 549, that, if this principle were sound, every railroad in the country would be exempt from taxation because they had all been declared to be post roads, and the same reasoning would apply to every bridge and navigable stream throughout the land. It was held therefore that the Act of Congress, *supra*, § 208, granted to the telegraph company no right of exemption from taxation of its property located in the State, and that this method of mileage apportionment was a reasonable and just method of determining the value of its line within the State.

§ 250. Value of property outside State to be considered in valuation under mileage apportionment.

It was strongly contended in the case last cited from Massachusetts and also in the case from Indiana, that the

The board had no authority to impart to the railroad track and rolling stock within the State any part of the value of the company's various interests and property without the State.

[1] W. U. Telegraph Co. *v.* Massachusetts, 125 U. S. 530; Massachusetts *v.* W. U. Tel. Co., 141 U. S. 40; W. U. Telegraph Co. *v.* Taggart, 163 U. S. 1. The principles of these cases were followed and applied in State ex rel. *v.* Western Union Tel. Co., 165 Mo. 502, where the proportion of the franchise exercised in the State was held taxable by adding the proportional part of the value of the franchise to the value of the property located in the State.

company was entitled to a deduction from the valuation as fixed, on account of property located in other States and taxable under the laws of such States and also on account of property exempt from taxation.

In W. U. Tel. Co. *v.* Taggart, the court, referring to the prior decision in regard to the same company, said at page 18: —

"Those decisions clearly establish that a statute of a State, requiring a telegraph company to pay a tax upon its property within the State, valued at such a proportion of the whole value of its capital stock as the length of its lines within the State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other States; unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional."

The law of Indiana provided that the company should return a statement of its whole capital stock, the par value of its shares and their market value, or if they had no market value, their actual value, its real estate and other property in the State subject to local taxation, its real estate outside of the State and not directly used in the conduct of its business and the sums at which such real estate was assessed for local taxation, the mortgages upon the whole or any part of its line, and the whole length of its line and the length within the State and each county and township of the State. From these statements and such other information as it might have or obtain, the board of tax commissioners was directed to value and assess the property by ascertaining the true cash

value of its entire property, for that purpose taking the aggregate value of its shares, if they had a market value, or, if they had none, the actual value thereof. Then, for the purpose of ascertaining the true cash value of the property within the State, after deducting property taxable locally, the proportion of the whole aggregate value of the property was computed on a mileage basis. This act had been construed by the Supreme Court of the State [1] as simply providing for the valuation of the property in the State, and that, if it was shown that for any reason the larger proportional values existed outside the State, then deductions should be made therefor.

Demurrer was sustained to the bill of complaint of the telegraph company, and this ruling was affirmed by the Supreme Court of the State, and, on writ of error, by the Supreme Court of the United States. The latter court said that it would be presumed, in the absence of evidence to the contrary, that the State board had deducted from the total valuation of all the interstate property such value, if any, of extra-state property as would leave the remaining property within and without the State, as near as might be of equal proportional value. It was claimed in the bill of complaint that the price obtained for a few of the shares in the New York Stock Exchange did not fairly represent the actual value of plaintiff's property; and that any price at which any shares might be sold by holders thereof, whether calculated upon any market value or upon actual value, included a consideration of the plaintiff's franchises, contracts, past and probable future earnings, the skill and enterprise of its managers and real estate of great value in Indiana or elsewhere, all of which were blended so as to render it impossible to separate and disintegrate the portions of value applicable to each and any of said elements of

[1] 141 Ind. 281.

value in its shares. The court said, at page 30, that this was hardly more than an argument to show the difficulty of ascertaining the actual cash value of plaintiff's property in the State of Indiana. "It certainly has no tendency to show that the tax commissioners did not, as they were required to do by the statute as since construed by the Supreme Court of the State, assess the plaintiff's property in Indiana at its true cash value according to their best knowledge and judgment, and after making all proper deductions, on account of larger proportional values of its property and business outside the State, or for any other reason."

§ 251. **Unit rule applied to express companies.**

The most signal and closely contested applications of the unit rule with mileage apportionment were in the taxation of the Adams Express Company, under the so-called Nichols Law of Ohio and under a similar law of Kentucky.

The Nichols Law required every telegraph, telephone and express company doing business in Ohio to file a return to the State board, setting forth, among other things, the number of shares of its capital stock, the par and market value thereof, and, when the shares had no market value, their actual value at the date of the return; also a statement in detail of the entire real and personal property of the company, where it was located and its value. Express companies were also required to include a statement of their entire gross receipts for the year, from whatever source derived, of business wherever done and of that done in the State of Ohio, giving the receipts of each office in the State, and the whole length of rail and water routes over which the company did business within and without the State. The board was required to meet in June and assess the value of the property of the companies in Ohio under the following rule:[1] —

[1] Adams Express Co. *v.* Ohio, 165 U. S. 194.

"In determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

§ 252. **Ohio express company cases.**

In the case of express companies, the apportionment was to be made among the several counties in which they did business, in the proportion that the gross receipts in each county bore to the gross receipts in the State. The amount thus apportioned was to be certified to the county auditor and there taxed at the same rate as other personal property. Provision was made for hearing and for the correction of erroneous and excessive valuations. Assessments were made upon the property of the express companies in Ohio as follows: —

Adams Express Company.....$533,095.80.
American Express Company..... 499,373.60.
United States Express Company.... 488,264.70.

Bills were filed to enjoin the collection of these taxes, on the ground that the companies had no property in the State of Ohio except certain horses, wagons, harness and the like, and that the value of their capital stock or shares and of express companies generally was determined, not so much by the value of their property and appliances, as by the skill, diligence, fidelity and success with which they conducted their business. They claimed that they owned

property of great value which was not situated in the State of Ohio and that their business connections, reputation and good-will had entered largely into the value of their capital stock and shares; that the market price was speculative and variable, dependent upon financial conditions not connected with the business of the company or its property; and that the method of taxation was violative of the Constitution, was an illegal burden upon interstate commerce and was a denial of the equal protection of the laws.

The express companies returned the value of their property in and out of the State, the whole gross receipts in the State and the length of their lines in and out of the State, but made no return of their entire gross receipts of business wherever done, nor of the terms of their contracts or arrangements for transportation. The court held, opinion by Chief Justice Fuller, that the act was not open to the objections claimed, under the Federal Constitution, saying at page 220: —

"As to railroad, telegraph and sleeping car companies engaged in interstate commerce, it has often been held by this court that their property, in the several States through which their lines of business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State without violating any Federal restriction."

The court conceded that there was a difference between the property of railroad and telegraph companies and that of express companies, but maintained that there was the same unity in the use of the entire property for a specific purpose, and the same elements of value arising from such use. It said, at pp. 221 and 222: —

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons

and furniture, than that of railroad, telegraph and sleeping car companies, to roadbed, rails and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others."

The court said it was this unity of use which enabled $23,400 of horses, wagons, safes and so on, in the State to produce $275,446 in a single year. It declared that the language of Justice Lamar in the case of Pacific Express Co. *v.* Seibert,[1] that express companies have no tangible property of any consequence subject to taxation, was used with reference to the legislation of the State of Missouri, and had no application to the scheme of taxation now under consideration. The property taxed in this case had its actual *situs* in the State, and was therefore subject to the State's jurisdiction, and the distribution among the several counties was a matter of regulation for the State legislature. There was no attempt to tax property having a *situs* outside the State, but only to place a just value on that within. The court added, at page 227: —

§ 253. Special circumstances requiring deduction must be shown.

"Special circumstances might exist, as indicated in Pittsburgh, Cincinnati &c. Railway *v.* Backus, 154 U. S. 421, 443, which would require the value of a portion of

[1] 142 U. S. 339, l. c. p. 354.

the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the cases at bar is that there is no showing of any such separate and distinct property which should be deducted, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis.

"The States through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute."

The classification of express with railroad and telegraph companies as subject to the unit rule does not deny them the equal protection of the laws, and there was nothing in the procedure here used which was obnoxious to the constitutional provision.[1]

[1] Justices Gray, Brewer, Shiras and Peckham concurred with the Chief Justice; but strong dissent was made by Justices White, Field, Harlan and Brown. The opinion filed by Justice White on behalf of those dissenting insisted that there was no power in the State to tax property outside of its jurisdiction, which in effect it had done in this case under the theory of a homogeneous unit; and that the mere fact that the same owner has property in different States which contribute to his earnings does not create such a unity for the purposes of taxation as to make the property located in one State taxable in another. It was asked, why could not the same rule be applied to a corporation or partnership engaged in the dry goods business, or any other business having branches in different States, on the theory that there was a unity of earnings between the agencies in all the establishments? This would warrant any State, in which one of the branches was established, in taxing the whole on the theory of unity.

§ 254. Rehearing of express company cases denied.

A motion for rehearing was filed in this case, with exhaustive briefs. The rehearing was claimed on different grounds, including the extreme importance and far-reaching effect of the decision, the entire novelty of the questions discussed and the points necessarily determined by the judgment. It was urged that the opinion was inconsistent with the opinion in the railway case,[1] and the Indiana telegraph case.[2] The doctrine of unity in use applied to railroad and telegraph companies, counsel also argued, has no application to the horses and wagons and other property employed by an express company, as there is no physical unity, and the doctrine of unity in use of property which has no connection except in the fact of its employment is no basis for taxation.[3]

The petition was denied in a vigorous opinion by Justice Brewer,[4] who said: —

"The importance of the questions involved, the close division in this court upon them, and the earnestness of counsel for the express companies in their original arguments, as well as in their briefs on this application, lead those of us who concurred in the judgments to add a few observations to what has hitherto been said."

After saying that the court had repeatedly affirmed the

For opinion of the Circuit Court, see Ohio *v.* Jones, 51 Ohio 492.

Judge Taft, U. S. Circuit Judge, had held the law invalid under the Constitution of Ohio, Adams Ex. Co. *v.* Poe, 61 Fed. Rep. 470, but subsequent to the ruling of the State court held it valid, W. U. Tel. Co. *v.* Poe, 64 Fed. Rep. 9, and the judgment was affirmed in the U. S. Circuit Court of Appeals, Sanford *v.* Poe, 37 U. S. App. 378, and 69 Fed. Rep. 546.

[1] C. C. C. and St. L. Railway Co. *v.* Backus, 154 U. S. 439.

[2] Western U. Tel. Co. *v.* Taggart, 163 U. S. 1, *supra*.

[3] See brief by James C. Carter of New York, and Lawrence Maxwell, Jr., in report of case, 166 U. S. 217.

[4] 166 U. S. 217.

right of a State to tax at their full value all the instrumentalities used in commerce, that the taxes complained of in this case were not privilege taxes, but purported to be upon the property of the companies, and that the burden of the complaint therefore was that it was an attempted taxation of property beyond the limits of the State, he continued, page 218: —

§ 255. Intangible property of corporation properly considered in valuation.

"But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing at its real value such intangible property." * * *

"It matters not in what this intangible property consists, whether privileges, corporate franchises, contracts or obligations. It is enough that it is property which though intangible exists, which has value, produces income and passes current in the markets of the world. To ignore this intangible property or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from

the tax lists, and the only property placed thereon be the separate pieces of tangible property?"

After showing that the express companies had intangible property and that this was what gave value to their stock, and illustrating by the case of the Henderson Bridge Company, the validity of the taxation of which was before the court in another case, the court said, page 220: —

"It is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation." The substance of right demands that, whatever be the real value of any property, that value may be accepted by the State for the purposes of taxation, and this ought not to be evaded by any mere confusion of words. The court continued at page 221: —

§ 256. Distinction between construction of statute and taxing power of State.

"A distinction must be noticed between the construction of a State law and the power of a State. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the State comprehends all property in its scheme of taxation, then the good-will of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint-stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises, and all contracts, privileges and good-will of the concern."

After stating the values of different classes of tangible property belonging to the company and the valuation of its capital stock in the market, the court said, page 222: —

"But what a mockery of substantial justice it would be

for a corporation whose property is worth to its stockholders for the purposes of income and sale $16,800,000, to be adjuged liable for taxation upon only one-fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.

§ 257. Facts warranting deduction must be shown by company.

"It is suggested that the company may have bonds, stocks or other investments which produce a part of the value of its capital stock and which have a special situs in other States or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth $16,000,000 and over, is invested in United States bonds, and therefore exempt from taxation, or invested in any way outside the business of the company and so as to be subject to purely local taxation, let that fact be disclosed, and then if the State of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That if such facts exist they must be taken into consideration by a State in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this court."

§ 258. Situs of intangible property of interstate company.

As to the *situs* of the property, the court said, page 223:—

"But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different States, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000, and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter."

It was then shown that the maxim "*mobilia personam sequuntur*" was never of universal application and has seldom interfered with the right of taxation, and that, while a corporation is a citizen of the State which creates it, for the transaction of its business it goes into various States, and wherever it goes as a corporation it carries with it its franchise. The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and it is as much a thing of value as is the franchise to be. Franchises to do go wherever the work is done. Referring to the Southern Pacific Railway, which is said to have no property in Kentucky, the State where it is chartered, but has a vast amount on the Pacific slope, the court asked: —

"Do not these intangible properties — these franchises

to do — exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every State in which that tangible property is found? ''

After saying that perhaps injustice to corporations would result by the conflicting action of different States and that the courts might be called upon to relieve against such abuses, and yet that all such possibilities did not equal the wrong which sustaining the contention of the appellant would at once do, the court concluded as follows, p. 225: —

"The injustice of this speaks for itself. In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no finespun theories about situs should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires. The petition for a rehearing is denied.''

§ 259. Kentucky express company case.

The case of Adams Express Co. *v.* Kentucky,[1] involved the Kentucky statute imposing a tax upon every corporation having or exercising any exclusive privilege or franchise not allowed by law to natural persons, or performing any public service. The statute provided that, in addition to other taxes imposed by law, every such corporation should pay an annual tax on its franchise to the State, and a local tax thereon to the county. The court sustained the tax thereby levied upon the express company, saying in an opinion by Chief Justice Fuller, that, taking the whole act together, the word "franchise" in the statute was not employed in

[1] 166 U. S. 171.

a technical sense, but that the legislative intention was plain that the entire property, tangible and intangible, of all foreign and domestic corporations and all foreign and domestic companies possessing no franchise should be valued as an entirety, the value of the tangible property be deducted and the value of the intangible property thus ascertained be taxed under these provisions. The reasoning of the Ohio case applied here.[1]

§ 260. Power of State in valuing interstate properties as defined by Supreme Court.

The unit rule of valuation, that is, the valuation of the portion in the State of the entire property, tangible and intangible, in and out of the State, as an entirety, being the value in use as distinct from the value of separate detached parcels located in the State, has thus been sustained by the United States Supreme Court in relation to railroad, telegraph and express companies. But the value of property outside of the State, which is necessarily involved in valuing interstate property as an entirety, is only allowed to be

[1] The same four judges dissented in this case as in the Ohio case, Justice White on their behalf saying that this differed from the Ohio case, in that there the statute purported only to tax the tangible property within the State, but empowered the assessing board to consider its value as augmented by the use to which such property might be put. "In other words, the Ohio law, as construed by the Supreme Court of that State, taxed only tangible property within the State enhanced in value by intangible elements outside the State. We considered, in dissenting in the Ohio case, that this was a mere disguise, a distinction without a difference, but the court held otherwise. In this case, by the law in question, the mask is thrown off, and what we conceive to be logically the thin disguise under which the courts of Ohio supported its statute is not asserted to exist, but the Kentucky statute, in unambiguous and unmistakable language, imposes the imperative duty upon the assessing board to assess property both in and out of the State. That is to say, it leaves nothing to implication or to evasion, but declares in plain English that property in and out of the State shall be assessed."

considered as a means of arriving at the value of the property which is within the State, that is, the State's proportionate part of the value of the entire property. In the absence of evidence to show that such apportionment is unjust, the State may determine what part of the entire property is located within the State by the mileage rule of apportionment. That rule therefore has not been sustained as an absolute rule in the case of interstate properties, although it seems to have been in the case of intra-state properties, that is, such a method of intra-state apportionment violates no Federal law.[1] Thus the court in the Indiana railroad case[2] said that the Indiana statute did not require that the value of the road should be "determined absolutely" by dividing the gross value on the mileage basis, but only that the amount of stock and indebtedness should be "presented for consideration" by the State board; and that it is *ordinarily* true that the mileage apportionment is fair and just.

§ 261. Evidence of inapplicability of mileage rule admissible.

As incident to this unit rule of valuation with mileage apportionment, the corporation has the right to show by all proper evidence that the application of the mileage rule of apportionment to such valuation is for any reason imperfect and injust. Thus it may show that it holds property included in such valuation as an entirety which is exempt from taxation. It may also show that its property in other States is of disproportionate value, as, for instance, that it is located in a more densely settled community, where it is proportionately more productive, or consists of terminals in large cities of other States. All

[1] See *supra*, Sec. 240.
[2] 154 U. S. 430.

such facts are relevant as bearing upon the value of the State's portion of the entire property. A State statute or procedure by a State under a statute, which denied the company the opportunity of proving such facts, would doubtless be held invalid. Thus in the Indiana telegraph company case, *supra*, § 250, the statute was held valid because it had been construed by the Supreme Court of the State as requiring a deduction from the valuation if such circumstances were shown.

§ 262. Stock market quotations as evidence of value.

In determining the value of the entire property under the unit rule, the State authorities may consider any facts tending to show that value. Thus the stock market quotations of the company's securities may be considered because the stock and indebtedness represent the property. But they are not to be regarded as conclusive standards or tests of value, and they have not been declared to be such by the Supreme Court. They are *indicia* of the then existing public estimate of the value of the company's property as shown by the result of the relative pressure of buying and selling orders for small interests in that property. In the language of the Supreme Court[1] such quotations represent "the faith which a purchaser of stock in such a company has in the ability with which the company will be managed, and in the capacity to make future earnings. It may be well or ill founded. It is but matter of opinion which in itself is not property. While the value of the property is one of the material factors going to make up the market value of the stock, yet it is plainly not the sole one. Mere speculation has not uncommonly been known to exercise a potent influence on the market price of stock."[2]

[1] Pullman's Car Co. *v.* Transportation Co., 171 U. S. 155.

[2] See § 240, *supra*. This case involved the value of the property of a manufacturing company and was not one of taxation. The franchise

The taxing authorities have the right to consider such evidence, but as evidence only. Thus in the Indiana railroad case, *supra*, § 243, the certificate of the assessing board stated[1] that in arriving at the basis of the estimate of values, the board had considered the cost of construction and equipment, the market value of the stocks and bonds, the gross and net earnings, and all other matters appertaining thereto that would assist it in arriving at the true cash value of the same.

§ 263. Presumption that all evidence submitted was considered in valuation.

Whatever evidence, relative to the value of the property as an entirety and the disproportionate value of the property in other States, is submitted to the assessing board, it is presumed that the board takes all those matters into consideration in connection with its information relative to the total amount of the stock and indebtedness of the company. There can be no presumption that the board took into consideration matters which were not properly receivable and properly to be considered in making such valuation. This is the rule applied in all cases of the assessment of property for taxation, even in jurisdictions where a judicial review of the proceedings of tax assessing boards is allowed. The presumption is always that the valuation is based upon the evidence submitted.[2] It is true however that in this class

value was excluded as not properly considered in determining the value of the property. But the other reason for excluding market value, the existence of speculative considerations therein, may apply to a case of taxation. See case of People ex rel. *v.* Coleman, 126 N. Y. 433, for discussion of the relation of market value to "actual value." The court said that when the amount of capital and surplus was undisclosed and unknown, the assessor could consider the market value not as the thing to be valued and taxed, but as an aid to discovering actual value.

[1] 154 U. S. 433.

[2] See also *infra*, "Due Process of Law in the Assessment of Interstate Properties." See also an able review of the decisions of the Su-

of cases there is sometimes great practical difficulty in determining that an assessing board considered only proper elements of valuation in calculating the value of property within the State, and this may be a practical embarrassment in the judicial review of the action of such *quasi* judicial tribunals.

As to the right to have the property, when the value in the State is ascertained, assessed equally with other property, see *infra*, Chapter XVI, "Equal Protection of the Laws."

preme Court in relation to the taxation of interstate carriers in the address of Robert Mather, Esq., of Chicago, on "Constitutional Construction and the Commerce Clause," before the American Bar Association in 1897, 20 Vol. Reports of Am. Bar Ass'n. 279.

CHAPTER IX.

TAXATION OF NATIONAL BANKS.

§ 264. Taxing authority of States over national banks.
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290. Discrimination must be substantial.
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§ 295. Mere mistake in judgment no discrimination.
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298. Taxation of real estate of national banks.
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301. Visitorial power of State over national banks.

§ 264. Taxing authority of States over national banks.[1]

National banks, organized under Act of Congress, are instrumentalities of the Federal government created for national public purposes, and as such are subject to the paramount authority of the United States. It has been held by the Supreme Court, not only that any attempt by a State to define their duties or control the conduct of their affairs is absolutely void, but that the "respective States would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress." [2]

The first Act of Congress providing for the organization

[1] A number of decisions have been rendered in the State courts and United States Circuit Courts on the subject of State taxation of national banks, where subsequently the questions discussed have been definitely decided by the Supreme Court. Other decisions of these courts relate to the question of construction of State statutes, which are not within the scope of this work. It has been the aim however to give such of the State decisions as apply and distinguish the rules laid down by the Supreme Court, or which bear upon questions not included in the decisions of that court.

[2] Owensboro National Bank *v.* Owensboro, 173 U. S. 664, l. c. p. 668; Davis *v.* Elmira Savings Bank, 161 U. S. 276. This limitation upon the taxing power of the State is more comprehensive than that laid down by the court in McCulloch *v.* Maryland, *supra*, § 7. The taxes declared void in that case and in Osborn *v.* United States, *supra*, § 8, were upon the operations of the bank, and the ruling was declared not to extend to a tax on the real property of the bank nor to a tax on the interest of citizens in the bank, when taxed in common with other property of the same description.

of national banks, passed February 25, 1863,[1] contained no grant of power to the States to tax national banks in any form; but the amendatory Act of June 3, 1864,[2] section 41, provided as follows: —

"(1) Provided that nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. (2) Provided, further, that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares of any of the banks organized under authority of the State where such association is located. (3) Provided, also, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

It is also provided in section 40 that the president and cashier shall cause to be kept a full and correct list of the names and residences of all the shareholders and the number of shares held by each, in the banking office, and that the list shall be subject to the inspection of all shareholders and creditors of the association and the officers authorized to assess taxes under State authority, during the business hours of each day.

§ 265. Amendment of 1868.

In 1868, the section of the statute authorizing the taxation of national banks was amended and re-enacted in the

[1] c. 58, 12 Statutes 665.

[2] c. 106, 13 Statutes 99.

form in which it has since appeared in the Revised Statutes, as follows: —

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State in which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State, shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

It will be observed that the provision in the original act, that the tax should not exceed the rate imposed upon the shares of any of the banks authorized under the authority of the State where the association was located, is stricken out. This amendment however was not material, as the prohibition of discrimination in favor of State banks is included in the provision that the shares shall be taxed at no greater rate than is assessed upon "other moneyed capital" in the hands of individual citizens of the State; for this clearly includes shares of stock in State banks.[1] The only other amendment relates to the place of assessment, the original act providing that the assessment must be at the place where the bank is located and not elsewhere, while in the amended act the legislature may determine the manner

[1] Mercantile Bank *v.* New York, 121 U. S., p. 156.

and place of taxation, subject to the restriction as to place, that the shares of non-residents shall be taxed at the location of the bank.

§ 266. Supreme Court on U. S. statute authorizing State taxation of national banks.

The Supreme Court in a recent case,[1] after quoting this statute, section 5219, says, page 669: —

"This section, then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any State tax therefore which is in excess of and not in conformity to these requirements is void.

"So self-evident are these conclusions that the adjudicated cases justify the deduction that they have been accepted from the beginning as axiomatic and unquestioned, since the controversies as to taxation of national banks illustrated in the opinions of this court mainly depend, not upon any attempted exercise of a power to tax the property and franchises of the banks, but involved controversies as to whether, when the shares of stock in the names of the shareholders had been assessed according to law, the tax could be imposed upon them because of alleged discrimination or other illegalities."

§ 267. Method of State taxation allowed by U. S. statute is exclusive.

The taxing power of the State in relation to national banks thus resting upon the permission of Congress, and Congress having provided the method in which this power may be exercised, that method excludes any other.

[1] Owensboro National Bank *v.* Owensboro, 173 U. S. 664.

No license therefore can be exacted by the State or under State authority for the privilege of carrying on the business of a national bank,[1] nor can an occupation tax be imposed,[2] nor can a tax levied by a State on the president of each of the banks of the State be enforced as to the president of a national bank.[3] The State can tax the real estate of the bank as other real estate is taxed, because authority to do so is expressly given by the Act of Congress. But this is the only tax which can be levied upon the property of the bank, for the only other tax authorized is upon the shares of the shareholders. It follows therefore that no tax can be levied by the State upon the personal assets of the bank, such as safes, office furniture, etc.,[4] and this is equally true whether the bank is solvent or insolvent.[5] Thus the assets of the bank, when in the hands of a receiver, are not taxable. The Supreme Court said, in Rosenblatt *v.* Johnston, that if the shares had any value they were taxable in the hands of the holders, and that the property held by the receiver was exempt to the same extent as it was when in the possession of the bank before his appointment. A tax on the personal property of a national bank is invalid, even though

[1] Second National Bank of Titusville (Pa.) *v.* Caldwell, 13 Fed. Rep. 429; Carthage *v.* First National Bank of Carthage, 71 Mo. 508.

[2] Brooks *v.* State (Texas), 58 S. W. Rep. 1033; Nat. Bank of Chattanooga *v.* Mayor, 8 Heiskell (Tenn.) 814. National banks are not liable to a privilege tax imposed by a city ordinance on occupations and business transactions, although banks and banking are included in its terms.

[3] Linton *v.* Childs, 105 Ga. 567.

[4] National State Bank *v.* Young, 25 Iowa 311; San Francisco *v.* Bank, 92 Fed. 273; State *v.* First Nat. Bank, 4 Nev. 348; First National Bank *v.* Province, 20 Montana 374.

[5] Rosenblatt *v.* Johnston, 104 U. S. 462. See also First National Bank *v.* San Francisco, 129 Cal. 96; Stapylton *v.* Thaggard, 91 Fed. Rep. 93, and 33 C. C. A. 353; City of Boston *v.* Beal, 5 C. C. A. 26, First Circuit; People *v.* National Bank, 123 Cal. 53; Covington City National Bank *v.* Covington, 21 Fed. Rep. 484; Woodward *v.* Ellsworth, 4 Colo. 580; Baker *v.* King County, 17 Wash. 622.

the legislature has made no provision for taxing the shares thereof, and the tax actually levied does not exceed the amount of what might have been assessed on the shares under local authority therefor.[1]

§ 268. State franchise tax not enforceable against national banks.

It follows that a national bank cannot be taxed by a State under a statute taxing "the property and franchises of every corporation having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service." This was the decision in a case from Kentucky.[2] The State Court of Appeals decided that the taxation of national banks under this statute was valid, as in effect it was equivalent to a tax upon the shares of the shareholders. The Supreme Court however reversed this decision, and said that the argument relied on, if adopted, would operate to destroy the power to tax which the Act of Congress sanctions, and that, as a general principle, it is settled that the taxation of property, franchises and rights of a corporation is one thing, and the taxation of the shares of stock in the names of the shareholders quite another. The court said in this regard, at page 681: "This doctrine has been applied to sanction the taxation of the one where the other was covered by a contract of exemption. As a result of its application much property has been brought within the range of the taxing power which otherwise would escape taxation."

It said further that, as there is no equivalency between the assessment of the bank and the assessment of the

[1] First Nat. Bank *v.* San Francisco, 129 Cal. 96.

[2] Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664. The same statute was construed by the court in the case of Adams Ex. Co. *v.* Ky., 166 U. S. 171, *supra*, § 259, and Henderson Bridge Co. *v.* Kentucky, *supra*, § 197.

shares, it follows that the tax, which was assessed on the franchises or intangible property of the corporation, was not within the purview of the authority conferred by the Act of Congress, and was therefore illegal. It was strongly argued that there was an equivalency *in fact*, as the tax was no greater than that which would have been imposed in the form of a tax levied upon the shareholders, the franchise tax being based upon the valuation of the combined sum of the par of the stock, the surplus and undivided profits. But the court said that if mere coincidence of the amount and not legal power were the test, only pure questions of fact would arise in any given case, and continued: "The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one the unlawful tax should be held valid, does not strike us as worthy of serious consideration." [1] The court added: —

"The system of taxation devised by the act of Congress is entirely efficacious and easy of execution. By its enforcement, as interpreted, settled policies of taxation have been evolved embracing large amounts of property which would not otherwise be taxable, and which, as we have seen, will escape taxation if the past development of the system be destroyed by recognizing, without reason, a principle inconsistent with the law and destructive of the safeguards which it imposes."

"From the foregoing conclusions, it results that as the taxes were imposed upon the bank and its property or franchise, and not upon the shares of stock in the name of the stockholders, such taxes were void." [2]

[1] But as to the effect of equivalency in fact, see Postal Tel. Cable Co. *v.* Adams, § 214, *supra*.

[2] This Kentucky statute was also discussed in Scobee *v.* Bean, 22 Ky. Law Rep. 1076, 59 S. W. Rep. 860; First National Bank *v.* Stone, 88 Fed. Rep. 409.

§ 269. State may require bank to pay tax of shareholders.

Though the tax is only authorized to be levied upon the shares of the individual shareholders, and there is no authority to levy any tax upon the corporate property other than a tax upon the real estate, the State may require that the tax levied upon the shareholders shall be paid through the bank, which is thus made the agency of the shareholders in paying the tax, and which may recoup itself from the dividends. This was decided by the Supreme Court in a case from Kentucky, where it held[1] that the statutory appointment of the bank to pay the whole tax *in solido* as the agent of the shareholders was not inconsistent with the Federal law, authorizing only the tax upon the shareholders. It was further said that this was the only mode by which, certainly and without loss, the payment of the tax on all the shares, resident and non-resident, could be secured. This method of collection was justified by experience, and it was not to be rightly inferred, therefore, that Congress intended to prohibit it, after having expressly permitted the State to levy the tax.[2]

Where the bank has been made liable for the payment of

[1] National Bank *v.* Commonwealth, 9 Wall. 353.

[2] This mode of collecting the tax upon national bank shares has been very generally adopted. In Hershire *v.* First National Bank, 35 Iowa 272, it was held that under the Iowa statute a national bank was not liable for the taxes assessed against the shareholders unless it had in its possession dividends or property belonging to them. The case was distinguished from National Bank *v.* Commonwealth, 9 Wall. 353. The decision was based on the difference between the statute in issue and that of Kentucky, the Iowa statute making the bank simply the agent of the shareholders to pay the tax. The court said that the bank was not liable for the taxes except as other agents are when they have money belonging to the principal to pay them with. National Bank *v.* Commonwealth was also distinguished in Sumpter Co. *v.* Nat. Bank of Gainesville, 62 Ala. 464, where it was held that the levy upon the stock of the bank was not authorized by the statute of that State. See also Mechanics Bank *v.* Baker (N. J.) 46 Atl. 586, 65 N. J. L. 113, 549.

the tax upon the shares of its stockholders, it has been held that the State may force the bank to pay the tax by distraint of its property.[1] The distinction however between a tax upon the bank as the statutory agent of its shareholders and a tax upon the bank property as such must be preserved, as the former tax is authorized by the act of Congress, and the latter is not. Thus an assessment upon the property as such, or against the bank upon the stock *in solido*, is invalid.[2] This distinction is essential for the further reason that in States where deduction of debts is allowed in the assessment of "other moneyed capital," the national bank shareholder is entitled to a deduction of his personal indebtedness.[3]

Making a national bank the agent of the State to collect taxes assessed against the shares of the bank has been held by the Supreme Court to be a mere matter of procedure, and there is no discrimination against national banks where the State banks are not thus compelled to pay taxes for their shareholders, and the shareholders are looked to directly for such payment. [4]

[1] First National Bank of Omaha *v.* Douglas County, 3 Dillon 330. It was said by Judge Dillon: "Undoubtedly the bank could be made liable to pay such taxes by suit, and no reason is seen why the collection may not be enforced by distraint in the same manner as other taxes are collected."

[2] First Nat. Bank of Hannibal *v.* Merideth, 44 Mo. 500; City of Springfield *v.* First Nat. Bank, 87 Mo. 441, where it was held that the refusal of the officers of the bank to furnish the assessor with a list of the shareholders did not justify him in making the assessment and enforcing the tax against the property of the bank. First Nat. Bk. *v.* Fancher, 48 N. Y. 524; Nat. Bank of Chemung *v.* Elmira, 53 N. Y. 49; First Nat. Bk. *v.* Richmond, 42 Fed. R. 877; Albuquerque Nat. Bk. *v.* Perea, 5 N. Mex. 664; 1st Nat. Bk. *v.* Chehalis Co., 6 Wash. 64; Miller *v.* Merchants' Nat. Bk. (Ohio), 3 Nat. Bk. Cases 711.

[3] First Nat. Bank of Richmond *v.* City of Richmond, 39 Fed. Rep. 309.

[4] Merchants' Bank *v.* Pennsylvania, 167 U. S. 461.

§ 270. Place of taxation.

The Act of Congress provides that the legislature of each State may determine the manner and place of taxing the shares, subject to the restriction that those owned by non-residents of the State shall be taxed in the city or town where the bank is located and not elsewhere.[1] Where within the State the shares shall be taxed therefore, whether in the town or city where the bank is located or in the locality of the shareholder's residence, is subject to the determination of the State.[2]

The shares of non-residents of the State however are only taxable at the location of the bank. The holder of national bank shares is thus protected against double taxation under competing State authority, for such shareholder cannot be taxed at his domicil on shares in a national bank located in another State.[3] The Supreme Court of Massachusetts said, in the case cited, that, "whatever may have been the design or motive, we can have no doubt that it is within the constitutional power of Congress to establish a national bank in any State and to provide that its shares shall have such a local nature as to be exempt from taxation by other States; and that this power has been exercised in the present instance."

A national bank has under the law but one location, and

[1] The act of 1864 provided for including the shares in the valuation of personal property at the place where the bank was located and not elsewhere, and there was a conflict of judicial opinion as to whether the word "place" meant the State or the town where the bank was located. Opinion of Justices, 53 Me. 594; Austin *v.* Aldermen, 14 Allen 359; Markoe *v.* Hartranft, 6 Am. Law Reg. 487. A statute of Illinois providing for the taxation of shares in the city where the bank was located was valid, see Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490. But the court did not decide whether the State could provide for the taxation of shareholders at any other place within its jurisdiction. See also Austin *v.* Aldermen, 7 Wall. 694; Waite *v.* Dowley, 94 U. S. 527.

[2] Buie *v.* Commissioners of Fayetteville, 79 N. C. 267.

[3] Flint *v.* Board of Aldermen of Boston, 99 Mass. 141.

therefore only one taxable *situs* based on location. Where the bank was located in New Jersey, and, for the convenience of its customers in Philadelphia, maintained a clerk in that city to receive deposits, it was held not to become subject to taxation in Philadelphia.[1]

Where the statute of a State directs, as it lawfully may, that residents of the State owning stock in national banks located in the State shall be assessed for taxation thereon at their respective residences in the State, such shares must be returned for taxation like other personal property, and they would not therefore be taxable at the location of the bank.[2]

§ 271. **Manner of assessment.**

The Act of Congress provides that the legislature of each State may determine the manner as well as the place of taxation, subject to the other provisions of the act. Bank shares are therefore taxable, as other personal property of like character is taxable under the laws of the State. The property and also the surplus funds of the bank, in whatever form invested, are included in the valuation of the shares.[3] The shares are to be valued at their fair cash value on the assumption that the bank will continue its business, and not at what they would be worth in case the bank should be wound up, when that is not in contemplation.[4]

While a State bank is changing into a national bank and before the requirements of the State statute are fully complied with, it is subject to taxation.[5] A national bank is

[1] See National State Bank of Camden *v.* Pierce, U. S. Circuit Court of Pennsylvania, 2 Nat. Bank Cases 177.

[2] See Buie *v.* Commissioners of Fayetteville, 79 N. C. 267; also Goldsbury *v.* Warwick, 112 Mass. 384.

[3] First National Bank. *v.* Concord, 59 N. H. 75.

[4] National Bank of Commerce *v.* New Bedford, 155 Mass. 313.

[5] Commonwealth *v.* Bank, Penn. Com. Pleas, 2 Pearson 386.

not taxable on increase of stock, that is, the new shares are not taxable, until the certificate of increase is issued by the comptroller.[1]

Shares owned by a national bank in other national banks may be included in the valuation of the shares of the bank.[2] Thus in the case last cited the court said, at page 70: "The manifest intention of the law is to permit the State in which a national bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership. The proper inference is, that the law permits in the particular instance the taxation of the national banks owning shares of the capital stock of another national bank by reason of that ownership on the same footing with all other shares."

This principle has been applied to the case where a bank owns certain of its own shares, the value of which should be divided among the holders of the remaining shares in the assessment of the value of their respective interests.[3] It was contended in a Pennsylvania case that national bank shares could not be assessed at more than par, because other moneyed capital, that is money at interest, was only assessed at par, and that par must therefore be the maximum of taxable value of bank shares. But the Supreme Court held this position untenable, because money invested in a bank is not money put out at interest, and the par value of stock does not necessarily indicate its value.[4] It is immaterial that the bank's property or surplus may be invested in property itself exempt from taxation, see *infra*, § 274. It is also immaterial that the bank holds stocks of other corporations acquired by it in the course of business, whether such corporations are located in and taxed by the

[1] Charleston *v.* People's Nat. Bank, 5 S. C. 103.
[2] Bank of Redemption *v.* Boston, 125 U. S. 60.
[3] Dutton *v.* Citizens' National Bank, 53 Kansas 440.
[4] Hepburn *v.* School Directors, 23 Wall. 480.

State or not.[1] Deductions are not allowed on that account, unless required to conform to similar deductions allowed in the case of other moneyed capital in the State.

§ 272. Real estate in other States not deducted from value of shares.

The value of real estate, located in other States and assessed for taxation there under their laws, is not required to be deducted from the value for taxation of shares of national banks. This was decided by the Supreme Court in a recent case from Utah,[2] where the refusal of the assessors to make such a deduction was made an objection to the validity of the tax. The court said that the State of domicil is entitled under the National Banking Law to collect taxes upon the full value of the shares of stock, and to permit a deduction for the real estate located in other jurisdictions, the value of which necessarily makes part of the value of the stock, would reduce the real value of the shares for taxation without compensatory equivalent. The language of a Maryland case was adopted, at page 561, as expressing the true rule:[3] —

"The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate, or other property beyond the jurisdiction of this State, the latter having control over the shares and their true value, the peculiar nature and value of the investment of the capital stock of the corporation, beyond the limits of the State, can form no proper subject for specific deduction or abatement from the true value of the shares of stock, when presented to be assessed for pur-

[1] Pacific National Bank of Tacoma *v.* Pierce County, 20 Wash. 675.
[2] Commercial Bank *v.* Chambers, 182 U. S. 556.
[3] American Coal Co. *v.* County Commissioners, 59 Md. 185, 194.

poses of taxation. It is exclusively with the shares of stock, and their true value, as representing the entire corporate assets, that the tax commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to the real estate of the company situate within this State."

§ 273. Territories have same taxing power as States over national banks.

It was contended by a national bank of Montana Territory that Congress had only given consent to the taxation of stock in national banks by the States, and therefore such stock could not be taxed by a *Territory*. But the court said[1] that, although this was true according to the letter of the statute, yet the word "State" in this section must be construed in connection with the other sections of the act, and that it was clearly used, not in contradistinction to "Territory," but in its general popular sense, as including both the District of Columbia and the Territories.

§ 274. No deduction on account of holding United States securities.

It was decided by the Supreme Court, reversing the New York Court of Appeals, soon after the adoption of the National Banking Act of 1864, that it is immaterial that the capital of a national bank is invested in obligations of the Federal government, which are expressly exempted by Congress from taxation under State authority, whether held by individuals or corporations.[2] The tax authorized by Congress is therefore not upon the national banks, but

[1] Talbott *v.* Silver Bow County, 139 U. S. 438.

[2] Van Allen *v.* Assessors, 3 Wall. 573, Chief Justice Chase and Justices Wayne and Swayne dissenting, claiming that Congress did not intend to subject the national securities even by indirection to State taxation. See also Bradley *v.* People, 4 Wall. 459.

upon the interests of their shareholders, and the limited State tax authorized is one of the burdens annexed to the enjoyment of the rights and privileges conferred upon national banking associations. This ruling has been uniformly followed since. National bank shares are thus taxable by State authority at their full value like other property, whether the whole or a part of the capital of the bank is invested in Federal securities.

§ 275. Discrimination through taxation of State banks on capital or property.

As national securities, whether held by individuals or corporations, are exempt from taxation under State authority, it follows that the State banks when taxed upon their property or capital stock can claim exemption for so much of their property or capital representing their property, as is invested in such exempt securities. The statute of New York in force at the time of the adoption of the National Banking Act authorized the taxation of State banks upon their capital stock, and it was provided that the tax on the shares of national banks should not exceed their par value. But the Supreme Court held, in the case last above cited, all the judges concurring, that this taxation of State banks upon their capital stock involved a discrimination against the national banks. The court said at page 581: "Inasmuch as the capital of the State banks may consist of the bonds of the United States which are exempt from State taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders."

This ruling was made prior to the amendment of 1868 and while there was an express provision in the Act of Congress against discrimination in favor of State banks; but this provision, as stated, is included in the more comprehensive provision retained in the amendment of 1868 prohibiting

discrimination in favor of moneyed capital in the hands of individual citizens.

§ 276. Other moneyed capital is other taxable moneyed capital.

After the decision in Van Allen *v.* Assessors, *supra*, § 274, the New York statute was amended so as to provide that no tax should be assessed upon the capital of either State or national banks, but that the stockholders in both should be charged upon the value of their shares, though not at a greater rate than was assessed on other moneyed capital in the hands of individual citizens in the State. This was also claimed to be invalid, because the personal property of individuals was allowed a deduction on account of their holdings of United States securities, and therefore there was a discrimination in their favor as against the national banks. The court held [1] that this was not such a discrimination as was contemplated by the Act of Congress. The true construction of the clause of the Act of Congress is that the rate of taxation upon the shares shall be the same and no greater than that upon the moneyed capital of individual citizens that is subject to taxation, and the argument really meant that Congress should have repealed the exemption of securities in order to effect equality of taxation.

While the statute of 1864 was in force, it was claimed that the taxation of national bank shareholders in Missouri was invalid, for the reason that the State by charters granted under the former constitution, authorizing exemptions from taxation, had made contracts of exemption with two banks and had thus disabled itself from taxing their shareholders in the same manner as those of national banks were taxed.

[1] Van Allen *v.* Commissioners, 4 Wall. 244. See also Bradley *v.* People, 4 Wall. 459, applying the ruling of Van Allen *v.* Commissioners to the taxing laws of Illinois. See also Exchange Nat. Bank *v.* Miller, 19 Fed. Rep. 372.

The court decided[1] however that this was not a discrimination within the meaning and intent of the act, and that Congress meant no more than to require of each State, as a condition for the exercise of the power to tax the shares of national banks, that it should tax them in like manner as it did the shares of banks of its own creation, so far as it had the capacity.

The same principle was applied in Delaware,[2] where the only subjects of taxation were real estate, live stock and bank shares. The court held that the words "other moneyed capital" imply that national bank shares are to be classed as moneyed capital; and, as national banks were subject, under the Delaware law, to a tax of only one-fourth of one per cent, which was the rate imposed upon each share of the actual value of every banking institution of Delaware, there was no ground for complaint.

§ 277. Equality of taxation with other moneyed capital.

The National Banking Act, as amended in 1868, provides that the assessment upon the shares of national bank stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of a State. Difference in the rate of the tax levy between bank shares and other moneyed capital would be too obvious a discrimination for question.[3] But there have been a number of cases of alleged discrimination against national banks in State

[1] Lionberger *v.* Rowse, 9 Wall. 468, affirming Supreme Court of Missouri.

[2] First Nat. Bank of Wilmington *v.* Herbert, 44 Fed. Rep. 158.

[3] That is, an *actual* not an apparent difference in rate, see Merchants' & Manufacturers' Bank *v.* Pennsylvania, 167 U. S. 461. It was held in Providence Institution for Savings *v.* Boston, 101 Mass. 575, that the rate upon bank shares need not be as low as the lowest rate upon moneyed capital anywhere in the State, but it is sufficient if the rate on the bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located.

taxation, growing out of the peculiarities in the different taxing systems of the States. Thus some States allow deductions of debts from taxable personal property, others permit this deduction from taxable credits only, and others again allow no deduction whatever. In some States the sources of municipal and State revenues have been separated, and there is a consequent difference in the method of taxation of different classes of property. Also the States differ much in the matter of exemptions from taxation allowed according to the different views of public policy, and in the methods adopted to solve the difficult problem of taxing the different classes of personal property. The cases of alleged discrimination against national banks may therefore be grouped into the following classes:—

First, discriminations through *exemption* of other property; second, discriminations through *deduction* of debts from the valuation of other property; and third, discriminations through *inequality* in the *valuation* of bank shares as compared with other property.

All of these cases of alleged discrimination, particularly the first two classes, must be considered in the light of the construction given by the Supreme Court to the words "other moneyed capital in the hands of individual citizens."

§ 278. Discriminations through exemptions from taxation.

There is no discrimination against national bank shares in the limited exemption of property held for charitable and religious uses, allowed by the States from considerations of public policy.[1] Thus it was said by the court, in the case cited, that it was not intended, by the Act of Congress governing State taxation of national banks, to curtail the

[1] Adams *v.* Nashville, 95 U. S. 19.

taxing power of the State or prohibit the exemption of particular classes of property, which the legislature might choose to exempt. The discretionary power of the State legislature over these subjects remains as it was before the Act of Congress was passed, for the plain intention of the act was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power.

In a Pennsylvania case, this principle was extended to the exemption of mortgages, judgments, recognizances and money owing upon articles of agreement for the sale of real estate, all of which were exempted from taxation except for State purposes. The court held that this did not constitute a discrimination,[1] saying, l. c. page 485: —

"This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it. Necessarily there may be other moneyed capital in the locality than such as is exempt. If there is, moneyed capital as such is not exempt. Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

§ 279. Allegations of discriminating exemption held to require answer.

But in a later case from Pennsylvania,[2] the allegations of the plaintiff in his petition were held to constitute a sufficient charge of discrimination to require an answer from the defendants. The Supreme Court reversed the judgment of the State court which had sustained a demurrer to the petition, following the decision in Adams *v.* Nashville. This petition charged that a very large amount of property

[1] Hepburn *v.* School Directors, 23 Wall. 480.
[2] Boyer *v.* Boyer, 113 U. S. 689.

in Pennsylvania had been relieved from the burden of county taxation, including all bonds or certificates of loans issued by any railroad company, shares of stock in the hands of stockholders of any institution or company of the State, mortgages, judgments and moneys due or owing upon articles of agreement for the sale of real estate and loans made by corporations, all of which were taxable for State purposes only.

The court said that, as the Act of Congress does not fix a definite limit as to percentage of value, beyond which the States may not tax national bank shares, cases will arise in which it will be difficult to determine whether the exemption of any particular part of the moneyed capital in individual hands is so serious or material as to infringe the rule of substantial equality.

Counsel urged that the State had exempted the railroad and other securities in question from local taxation, because it derived its princip al revenue from railroads and corporations, and therefore conserved its own interests in protecting such securities. But the court replied that it was not concerned with the motives of public policy which influenced the Commonwealth, and that its sole function was to construe the legislation of Congress permitting the several States to tax national bank shares. If the principal of substantial equality required in State taxation of such shares and other moneyed capital operates to disturb the peculiar policy of any State, the remedy is with Congress.

The court said, with reference to the Hepburn case, *supra*, § 278, that, while this is an authority for the proposition that a partial exemption by a State of moneyed capital for local purposes does not, of itself and without reference to the aggregate moneyed capital not so exempt, establish the right to the same exemption in favor of national bank shares, yet it is by no means authority for the broad proposition that national bank shares can be subjected to

local taxation where a very material part, relatively, of other moneyed capital in the hands of individual citizens within the same jurisdiction or taxing district is exempt from such taxation. It laid down the following rules deduced from the preceding cases, page 695: —

§ 280. Rules of Supreme Court as to discrimination.

"1. That the words 'at a greater rate than is *assessed* upon other moneyed capital in the hands of individual citizens' refer to the entire process of assessment, which, in the case of national bank shares, includes both their valuation and the rate of percentage on such valuation; consequently, that the Act of Congress is violated if, in connection with a fixed percentage applicable to the valuation alike of national bank shares and of other moneyed investments or capital, the State law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital.

"2. That a State law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than national bank shares, or which permits the taxpayer to deduct from the sum of his credits, money at interest or other demands to the extent of his *bona fide* indebtedness, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital."[1]

§ 281. Discriminating exemptions must be of competing moneyed capital.

This decision however, as will be seen, was rendered

[1] See Pollard *v.* The State, 65 Ala. 628, overruling McIver *v.* Robinson, 53 Ala. 456.

with reference to the sufficiency of the allegations in the complaint, and must be considered in the light of the more restricted meaning of the term "other moneyed capital" adopted by the court in later decisions. Thus in a case from Montana the Supreme Court held [1] that the exemption of the stock of mining corporations does not constitute a discrimination, saying that the restriction imposed in the act requires equality of assessment with other moneyed capital, — not with other property generally, but with that property which passes under the description of moneyed capital, citing Mercantile National Bank *v.* New York, *infra*, § 282.

§ 282. Meaning of "other moneyed capital."

The leading authority on the subject of the definition of moneyed capital adopted by the Supreme Court is found in the New York National Bank Case.[2] Discriminations were claimed, in view of the decision of the court in Boyer *v.* Boyer, *supra*, § 279, and were based upon the provisions of the New York statute exempting certain classes of personal property, which, it was claimed, constituted a very material part of all the moneyed capital in the hands of individuals. The court, in this case, after reviewing the decisions, defined the meaning of the words "other moneyed capital" as used in the statute, as follows, page 155: —

"Of course it includes shares in national banks; the use of the word 'other' requires that. If bank shares were not moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital, the value of which is measured in terms of money. In this sense, all kinds of real and

[1] Talbott *v.* Silver Bow County, 139 U. S. 438.

[2] Mercantile National Bank *v.* New York, 121 U. S. 138, affirming 28 Fed. Rep. 776.

personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money." * * *

"The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises, in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."[1]

This meaning of "other moneyed capital," which restricts

[1] As to "competing moneyed capital" see also McMahon *v.* Palmer, 102 N. Y. 176; Mercantile National Bank *v.* Shields, 59 Fed. Rep. 952; Nat. Bank of Baltimore *v.* Baltimore, 92 Fed. Rep. 239.

it to capital competing with national banks, has been reaffirmed in several cases.[1] Thus, in National Bank of Wellington *v.* Chapman, the court said that the main purpose of Congress in fixing limits to State taxation on investments in national banks was "to render it impossible for the State in levying such a tax to create and fix an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business" and investments of a like character. The language of the Act of Congress is to be read in the light of this policy. After quoting from the opinion in Mercantile National Bank *v.* New York, *supra*, the court said, page 214: "The result seems to be that the term 'moneyed capital' as used in the Federal statute does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or moneys belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal statute."

§ 283. No discrimination in New York taxation of railroad, business, mining or insurance companies.

Under the definition of moneyed capital quoted above, it was held by the Supreme Court[2] that there was no discrimination against national banks in the tax system of New York, on account of the exemption of the shares of either railroad, business, insurance or mining companies.

[1] National Bank of Garnett *v.* Ayers, 160 U. S. 660; Talbott *v.* Silver Bow County, 139 U. S. 438; First Nat. Bank *v.* Chapman, 173 U. S. 205; Aberdeen Bank *v.* Chehalis County, 166 U. S. 440; Bank of Commerce *v.* Seattle, 166 U. S. 463; Commercial Bank *v.* Chambers, 182 U. S. 556; Lander *v.* Mercantile Nat. Bank, 22 Sup. Ct. Rep. 908.

[2] Mercantile Bank *v.* New York, 121 U. S. 138.

The court said that, as to such corporations, so far as the policy of the government with reference to national banks is concerned, it is indifferent how the States choose to tax them, or whether they are taxed at all, and continued at page 156: "Whether property interests in railroads, in manufacturing enterprises, in mining investments and others of that description are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks."

It had been held in People *v.* Commissioners, *supra*, § 119, that there was no discrimination against national banks in the fact of an allowance to insurance companies of a deduction for their holdings in national securities, as such companies are not in the words or contemplation of the Act of Congress. This ruling was reaffirmed.

§ 284. No discrimination in New York taxation of trust companies.

Trust companies under the New York statute were taxable at that time for local purposes upon the actual value of their capital stock, but were subject to a franchise tax, in the nature of an income tax, payable to the State. It was urged in the case last cited that this was a discrimination in their favor as against the banks, including national banks.

The court, after enumerating the powers of trust companies under the law of New York, said that they were not banks in the commercial sense of that word, and did not perform the functions of banks in carrying on the exchanges of commerce. It admitted however, that receiving money on deposit and investing in loans and dealing in money and securities did properly bring the shares of stock of their shareholders within the definition of moneyed capital as used in the Act of Congress. But the court found that, under the method of taxation adopted

by the State of New York, there was no substantial discrimination, as trust companies paid the State franchise tax in addition to that for local purposes on their capital.[1]

§ 285. Nor in exemption of deposits in savings banks, building and loan associations or stock in foreign corporations.

The deposits in *Savings Banks* in New York, amounting to $437,107,501, with an accumulated surplus of $69,669,000, were admitted by the court[2] to be "moneyed capital." But it was said to be equally clear that such institutions are not within the meaning of the Act of Congress, because no one could suppose for a moment that savings banks come into business competition with the national banks of the United States. Their exemption was therefore in accordance with wise public policy, and could not operate as an unfriendly discrimination against investments in national bank shares. It is immaterial that savings banks are permitted to transact a banking business in the way of loans upon personal securities. They are substantially institutions organized in pursuance of a great and beneficial public policy, for the purpose of investing the savings of small depositors.[3]

[1] In a recent case, Jenkins *v.* Neff, 22 Sup. Ct. Rep. 905, affirming 163 N. Y. 320, the court reaffirmed this ruling as to trust companies. It was urged that trust companies by recent legislation of New York, had been placed on an equality with banks, and that they were practically doing a banking business competing with national banks. But the court said that there was no change in the legislation of New York which called for any limitation of the decision in the Mercantile National Bank Case. It was to be presumed that if the trust or other companies were exercising powers not authorized by the law, the State would take the proper steps to keep them within their statutory limits, and any neglect in a limited time to do so could not be construed as an assent by the State to such an improper assumption of power.

[2] Mercantile Bank *v.* New York, 121 U. S. 160.

[3] Bank of Redemption *v.* Boston, 125 U. S. 68; Davenport Bank *v.* Davenport Board of Equalization, 123 U. S. 83.

The same principle was extended to *Building and Loan Associations*, and it was held that the exemption of their funds from taxation does not constitute a discrimination.[1]

The exemption of municipal bonds of New York amounting to $13,467,000 was held in the same case to involve no discrimination. Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily subject to taxation, they are not within the rule established by Congress.

The court decided further that the exemption of stocks, owned by citizens of New York in corporations created by other States and amounting to at least $250,000,000, constituted no discrimination. It had been decided by the courts of New York that they were not subject to taxation, as they had no *situs* within the territory of that State for that purpose.[2]

§ 286. Discrimination through deduction of debts from "other moneyed capital."

The decisions of the Supreme Court, with reference to discrimination through the allowance of deduction of debts from personal property, must be considered in the light of the definition of other moneyed capital first announced in the Mercantile Bank case, *supra*, § 282. Under that definition, where the right of deduction is given to all personal property, including "other moneyed capital," or to such class of personal property as includes other moneyed capital competing with national banks, the same right of deduction must be given to shareholders in national banks. Thus the State of New York by its taxing policy allowed a deduction

[1] Mercantile National Bank of Cleveland *v.* Hubbard, 98 Fed. R. 465.

[2] The same ruling was applied to the taxing laws of New Jersey, which did not differ materially from the laws of New York. Newark Banking Co. *v.* Newark, 121 U. S. 163.

of just debts from the valuation of all personal property, excepting so much thereof as consisted of shares of stock in corporations. The Supreme Court held that this statute, as construed by the New York Court of Appeals, was a discrimination against the national bank shares in violation of the Act of Congress, for the owners of these shares could not diminish the amount of their tax by the amount of their debts as could the owners of "other moneyed capital."[1] The statute under which the assessment was made however was not rendered void by this discrimination, nor was the assessment made thereunder void, but was entirely valid if the stockholder had no debts to deduct. If he had debts, the assessment excluding them from computation was voidable, but the assessing officers acted within their authority in assessing him without deduction, until they were duly notified that he had debts.[2]

A national bank can maintain suit on behalf of its stockholders to enjoin the collection of a tax unlawfully assessed because of the failure to allow for the deduction of debts.[3] The court in the case cited permitted an amendment to the pleadings to allow each stockholder to show the amount of the deduction to which he was entitled.[4]

The statute of Indiana, allowing the taxpayer to deduct from the sum of his credits, money at interest and demands against persons or corporations the amount of his *bona fide*

[1] People *v.* Weaver, 100 U. S. 539. See opinion of New York Court of Appeals in People *v.* Dolan, 36 N. Y. 59; McHenry *v.* Downer, 116 Cal. 20, 45 L. R. A. 737 (annotated). People ex rel. *v.* Ryan, 88 N. Y. 142, holds that, where debts are allowed to be deducted from the value of the shares, a debt upon a note for borrowed money which was invested in government bonds should be deducted, although the transaction was a mere device to escape taxation.

[2] Supervisors *v.* Stanley, 105 U. S. 305.

[3] Hills *v.* Exchange Bank, 105 U. S. 319.

[4] As to procedure in matter of claiming deduction, see Stanley *v.* Supervisors of Albany, 121 U. S. 535.

indebtedness, but not permitting deduction from any other kind of moneyed capital, was also held to be a discrimination against national banks.[1] Counsel claimed that the statute of Indiana differed from the New York statute. But the court said that "credits, money loaned at interest and demands against persons or corporations are more purely representative of moneyed capital than personal property so far as they can be said to differ," and that the "rights, credits, demands and money at interest mentioned in the Indiana statute" meant "moneyed capital invested in that way." An injunction was therefore allowed against the enforcement of the tax as to those shareholders, who proved that they were entitled to deductions for debts.

§ 287. No discrimination in deduction of debts from non-competing capital.

The restriction of the meaning of "moneyed capital" is illustrated in the rulings of the court with reference to the taxing system of Ohio. Thus it was held[2] that shareholders in national banks of Ohio were entitled to a deduction of their *bona fide* indebtedness under the provisions of the Ohio statute allowing such deductions from credits. The attention of the court in this case does not seem to

[1] Evansville Bank *v.* Britton, 105 U. S. 322.

Chief Justice Waite and Justice Gray dissented on the ground that they did not think it was the intention of Congress to require a deduction for debts from the value of shares, when such deduction was only allowed to other persons from this one kind of moneyed capital. But Justice Bradley dissented for the reason that in his opinion the law was void *in toto* as to national banks; that the probability was that not one in ten of the shareholders would ever have notice of the assessment in time to claim deduction for debts, and one who had notice would naturally be reluctant to make known the amount of his debts before a board of bank officers. The law as thus construed would act as a prohibition against the purchase of stock by those who owed debts, and they constitute a considerable portion of every community.

[2] Whitbeck *v.* Mercantile Bank, 127 U. S. 193.

have been called to the specific definition in the Ohio statute of the "credits" from which deductions were allowed.

But in a later case[1] the court said that the system of taxation adopted in Ohio was not intended to be unfriendly or discriminative against the owners of shares in national banks, for the system was adopted by the State prior to the passage of the Act of Congress, and the shares in national banks were taxed precisely like the shares in State banks.

The discrimination was not illegal, unless it was shown clearly to be in favor of moneyed capital other than that employed in State or national banks. The term "credits" as defined in the Ohio statute included many subjects which had no possible relation to the business of national banks. It therefore devolved upon the shareholders who complained of discrimination to show how much moneyed

[1] National Bank of Wellington *v.* Chapman, 173 U. S. 205. The term "credits" from which deduction for debts is allowed in the Ohio statute is thus defined in the statute (see p. 209):—

"The term 'credits' means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay the tax thereon, including deposits in banks, or with persons in or out of the State, other than such as are held to be money as defined in this section, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal *bona fide* debts owing by such person; but in making up the sum of such debts owing, no obligation can be taken into account: (1) to any mutual insurance company; (2) for any unpaid subscription to the capital stock of any joint-stock company; (3) for any subscription for any religious, scientific or charitable purpose; (4) for any indebtedness acknowledged unless founded upon some consideration actually received and believed at the time of making the acknowledgment to be a full consideration therefor; (5) for any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; (6) for any greater amount or portion of any liability as surety than the person required to make the statement of such credits believes that such surety is in equity bound to pay, etc."

The court refused to consider the report of the auditor of the State showing that the total credits, after deducting debts allowed, amounted to

capital there was included in the credits from which deductions were allowed, and the record afforded no means of ascertaining that fact. The court said that the case of Whitbeck *v.* Mercantile National Bank of Cleveland, *supra*, was not an authority adverse to this principle, as the attention of the court in that case was not called to the peculiar terms of the Ohio statute.[1]

Under this decision it is not sufficient that the credits from which deduction is allowed include *some* moneyed capital. There must be some evidence from which the court can determine how much moneyed capital is in fact included, in order to decide whether or not there is a substantial discrimination.

§ 288. No discrimination in deduction of debts of unincorporated banks.

It was held in this same case that the deduction of debts existing in the business from the amount of moneyed capital belonging to a banker or unincorporated State bank is necessary for the determination of the real value of the capital that is employed in the business, and is equivalent in its results to the system employed in the case of incorporated State banks and national banks. As long as the deduction is allowed to the debts existing in the business only and not to general debts disconnected with the business, there is no discrimination. The court said, at page 216: —

"Thus in both incorporated and unincorporated banks the same thing is desired, and the same result of assess-

$106,000,000 to $111,000,000, the amounts differing to that extent as presented by counsel, as there was nothing to show that the report had been received in evidence or that there was any finding on the subject.

[1] For recent decisions involving the Ohio law, see Lander *v.* Mercantile Nat. Bank of Cleveland, 22 Sup. Ct. Rep. 908, reversing 45 C. C. A. 666, and Cleveland Trust Co. *v.* Lander, 62 Ohio St. 266.

ing the value of the capital employed in the business, after the deduction of the debts incurred in its conduct, is arrived at in each case as nearly as is possible, considering the difference in manner in which the moneyed capital is represented in unincorporated banks as compared with incorporated banks which have a capital stock divided into shares. That mathematical equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation, and it is useless and idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached. That measure of equality we think is reached under this system. So far as this point is concerned, it is entirely plain there is no discrimination between unincorporated banks and bankers on the one hand and holders of shares in national banks on the other."[1]

§ 289. Discrimination through failure to assess other moneyed capital.

Efforts to resist payment of taxes upon national bank shares, on account of the common failure of taxing authori-

[1] The Supreme Court of Nebraska reached the same conclusion in Bressler *v.* Wayne County, 32 Neb. 834, and 13 L. R. A. 614, in 1891, where the court construed and applied the decision of the United States Supreme Court in Mercantile National Bank *v.* New York, 121 U. S. 138, overruling the opinion previously reported in the same case, 25 Neb. 468. The court held that the term "credits", as used in the Nebraska statute, from which deduction of debts was allowed was not intended to include any moneyed capital, such as notes or other credits of that character. See also 1st Nat. Bk. *v.* Turner, 154 Ind. 456, making the same ruling as to the statute of Indiana; and in Virginia, Burroughs *v.* Smith, 95 Va. 694, and People's Nat. Bk. *v.* Marye, 107 Fed. Rep. 570. But see Newport *v.* Mudgett, 18 Wash. 271, distinguishing 1st Nat. Bk. of Aberdeen *v.* Chehalis Co., and Nat. Bk. of Com. of Seattle *v.* Seattle, *supra*, p. 320, and holding the deduction of debts from the assessed value of national bank shares required under the State constitution.

ties to reach intangible personal property for taxation, have proved unsuccessful. Such failure growing out of the inherent difficulties of enforcing such taxation, does not constitute an intentional discrimination within the meaning of the Act of Congress, for the difficulty is not in the State statute nor in its intentional administration. There must be a substantial showing in any event that the property escaping taxation is capital competing for business with the national banks, not merely a general averment of a legal conclusion. Facts must be stated, so that the court can determine as to the taxable character of the property which it is claimed is exempted.[1]

§ 290. **Discrimination must be substantial.**

Whatever be the character of the discrimination, it must be substantial, so as to constitute an effective violation of equality of taxation upon national bank stock as compared with other and competing moneyed capital.[2] As shown *supra*, § 268, the fact that the tax illegally imposed is no greater in amount than a legal tax would be constitutes no defense, so that form as well as substance may be material in determining the validity of the tax.

Thus in Wisconsin, where State banks were required to pay a semi-annual State tax of three-fourths of one per cent on the amount of the capital stock, regardless of the fact whether the capital was invested in United States securities or whether it had been lost in business or not, the court held that it was in effect a franchise tax, and therefore a fair equivalent to that imposed on the shares of stock of national banks.[3]

[1] Aberdeen Bank *v.* Chehalis County, 166 U. S. 440; Primm *v.* Fort, 23 Texas Civ. App. 605.

[2] Lionberger *v.* Rowse, 9 Wall. 468; Richards *v.* Town of Rock Rapids, 31 Fed. Rep. 505.

[3] Van Slyke *v.* The State, 23 Wisc. 655; Bagnall *v.* The State, 25 Wisc. 112, affirmed in 154 U. S. 581.

The revenue law of Kentucky imposing a tax on bank stock of fifty cents on each share equal to one hundred dollars of stock was held valid as to national banks[1] because the tax was clearly intended to be at the rate of fifty cents per one hundred dollars or one-half of one per cent on the share, whatever the par value of the stock.

§ 291. Difference in rate of taxation not necessarily discriminative.

The statute forbids discrimination between national and State banks or in favor of other moneyed capital in the hands of private individuals, but it does not prohibit a difference in rate between national banks under different circumstances, provided State banks and competing moneyed capital are treated in the same way. Thus the statute of Pennsylvania provided that, where any bank collected from its shareholders a tax of eight mills on the dollar upon the par value of its shares and paid the same into the State treasury, its shares and so much of its capital and profits as should be invested in real estate should be exempted from local taxation; but if any national bank failed to collect the tax of eight mills on the dollar upon the par value of its shares, it must then make a return showing the full number of shares of capital stock issued by it and the actual value thereof, which should be assessed for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens, that is to say, at the rate of four mills on the dollar of the actual value thereof. Thus if the bank had a large surplus and its stock was in consequence worth several times its par value, it would naturally elect to pay the eight mills, and thus in fact pay at a less rate on the actual value of its stock than a bank without a surplus whose stock was only worth par. The court held

[1] National Bank *v.* Commonwealth, 9 Wall. 353.

that this was no violation of the National Banking Act.[1] It was urged that there was discrimination, because, in case the State banks did not elect to pay the eight mills, the State would look to the stockholders directly for the regular four mills tax; whereas as to national banks it would reach the stockholders through the bank itself, and hence some shareholders in State banks might escape taxation. But the court said that this was a mere matter of procedure and did not affect the validity of the law.

§ 292. Equality of taxation requires equality in valuation as well as in rate of taxation.

It is obvious that inequality in taxation is effected as surely through difference in valuation by the assessors as by difference in the rate of taxation imposed by law. Such inequality between the assessment of national bank shares and other competing moneyed capital involves a discrimination in violation of the Act of Congress. This principle has been applied in several adjudged cases and the rule established that the inequality, to constitute discrimination, must be something more than sporadic and occasional, must in fact be habitual and intentional, so as to constitute a rule of conduct.

Thus the Supreme Court said in a New York case:[2] —

"This *valuation*, then, is part of the *assessment* of taxes.

"It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is, taxation. In what respect shall

[1] Merchants' & Manufacturers' Bank *v.* Pennsylvania, 167 U. S. 461.

[2] People *v.* Weaver, 100 U. S. 539, l. c. p. 545.

it be not greater than *the rate assessed* upon other capital? We see that Congress had in its mind an *assessment*, a *rate* of assessment, and a *valuation;* and, taking all these together, the taxation on these shares was not to be greater than on other moneyed capital."

In an Ohio case it appeared that the city of Cleveland generally assessed bank shares higher than other personal property, and that this was not a mere occasional incident, but a rule of conduct deliberately adopted. The tax on national bank shares was about sixty per cent of its real value greater than that on other moneyed capital.[1]

§ 293. Supreme Court on assessors' practice of valuation.

In another Ohio case from Toledo, it appeared that a rule of valuation had been established by the assessors, whereby ordinary personal property was assessed at about one-third of its actual value, money or invested capital at three-fifths of its actual value, while the assessment of shares of incorporated banks was fully equal to their selling price and true value in money. It was said that while the constitution and statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to taxation, yet it is a matter of common observation that in the assessment of real estate this rule is habitually disregarded.[2]

The opinion concluded, l. c. page 163: —

"And while it may be true that there has not been in

[1] Pelton *v.* National Bank, 101 U. S. 143.

[2] Cummings *v.* National Bank, 101 U. S. 153, Chief Justice Waite dissenting. As to the presumption of violation of official duty in such cases, see comments on this opinion in New York ex rel. *v.* Barker, 179 U. S. 279, l. c. 286. But it was held in Texas, Engelke *v.* Schlenker, 75 Tex. 559, that the legality of the assessment of a tax upon the property of a national bank which does not exceed its true value cannot be affected by the custom of the assessor to assess other property at a uniform valuation less than its true value.

other States such concerted action over a large district of country by the primary assessors in fixing the precise rates of departure from actual value, as is shown in this case, it is believed that the valuation of real estate for purposes of taxation rarely exceeds half of its current salable value. If we look for the reason for this common consent to substitute a custom for the positive rule of the statute, it will probably be found in the difficulty of subjecting personal property, and especially invested capital, to the inspection of the assessor and the grasp of the collector. The effort of the land owner, whose property lies open to view, which can be subjected to the lien of a tax not to be escaped by removal, or hiding, to produce something like actual equality of burden by an undervaluation of his land, has led to this result. But whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property around which the constitution of the State has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied so far as the judicial power can give remedy."

§ 294. Inequality must be intentional and habitual.

In both these Ohio cases injunctions were granted, complainants having paid into court the amount admitted to be due. This principle that inequality in valuation constitutes discrimination has been followed, but with the qualification already noted, that it must affirmatively appear that the inequality is intentional and habitual. Thus, in a New York case, where the assessors had adopted the plan of valuing bank shares at par,[1] and an action at law had been brought to recover taxes alleged to have been illegally col-

[1] Stanley *v.* Supervisors of Albany, 121 U. S. 535. See also as to procedure, Williams *v.* Supervisors, 122 U. S. 154.

lected, the court held that the testimony did not warrant the inference that there was an habitual assessment of national bank shares at a higher rate than other moneyed capital, and commented on the assessment at par as follows, l. c. page 548: —

"A different method might have led to perplexing difficulties, owing to the great fluctuations to which shares in banking institutions are subject, their value depending very much on the skill and wisdom of the managers of those institutions. Intelligent men constantly differ in their estimate of the value of such property, and the stock market shows almost daily changes. Presumptively the nominal value is the true value, any increase from profits going, in the natural course of things, in dividends to the stockholders. This method, applied to all banks, national and State, comes as near as practicable, considering the nature of the property, to securing, as between them, uniformity and equality of taxation; it cannot be considered as discriminating against either. Both are placed on the same footing." * * *

It was said that the proper remedy in such a case, if relief was not afforded by the State revising boards, was by application to a court of equity to restrain the collection of the excess upon payment or tender of what was admitted to be due.

In another Ohio case it appeared that other moneyed capital was valued on a sixty per cent basis and bank shares at a rate of sixty-five per cent, and the collection of the excessive five per cent was restrained.[1]

In a case from Illinois, where it appeared that the assessments were partial, unequal, unjust, and lacking in uniformity, but that there was no intentional discrimination

[1] Whitbeck *v.* Mercantile National Bank of Cleveland, 127 U. S. 193.

against national banks, it was said as to the New York and Ohio cases above cited:[1] —

"It is held in these cases that when the inequality of valuation is the result of a statute of the State designed to discriminate injuriously against any class of persons or any species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject."

§ 295. Mere mistake in judgment no discrimination.

The rule of the Kimball case was applied by the United States Circuit Court for the Southern District of Ohio,[2] where it appeared from the testimony that there was a general understanding at a meeting of the assessors from all parts of the State, that real estate should be assessed at two-thirds to three-fourths of its value; and there was evidence tending to show great inequality in valuations of all kinds of personal property, including shares of national banks, which were valued at about 86.7 per cent, a higher rate than that at which other personal property was taxed.

[1] National Bank *v.* Kimball, 103 U. S. 732. See also First National Bank of Chicago *v.* Farwell, 7 Fed. Rep. 518; Stanley *v.* Board of Supervisors, 15 Fed. Rep. 483; Exchange National Bank *v.* Miller, 19 Fed. Rep. 372; First National Bank of Toledo *v.* Lucas County, 25 Fed. Rep. 749; First National Bank *v.* Lindsay, 45 Fed. Rep. 619.

[2] Exchange National Bank *v.* Miller, 19 Fed. Rep. 372.

But it did not appear that this arose otherwise than from a mistake in judgment. The court said, at page 375: —

"It would, perhaps, be more exact to say that the judgment of the assessors, in their official valuation, differs from the judgment of witnesses in their unofficial valuation, as expressed in their testimony. The differences are no greater than frequently arise between witnesses in cases on trial on questions of value. And there is no certain standard by which the court can determine which is correct. Valuations, excepting of money and of standard marketable articles, are, at best, uncertain. The influences which affect salable values are various and often complicated. Much depends upon who is the owner or vendor, as well as upon who is the purchaser. The shrinkage in the value of estates results in many instances largely from the consideration that the salable value imparted by the fact of the ownership of the deceased is gone. A thousand influences, tangible and intangible, so affect the salable value of property, real and personal, in the city and in the country, as to make its true valuation a work of exceeding difficulty, and it is not to be wondered at, nor is it a circumstance of itself warranting an appeal to a court of chancery, that there are great inequalities in valuations for taxation. To correct these the State has provided for appeals to appropriate tribunals, whose duty it is to equalize valuations and the burden of taxation. When these are exhausted all that can be done, practically, is done, excepting in cases of intentional discrimination."[1]

[1] The mere fact that there is a different mode of taxing moneyed capital in savings banks and other corporations from that employed in the case of national banks is not enough to show discrimination. Richards *v.* Rock Rapids (Iowa), 31 Fed. Rep. 505. The court said that, if the total burden of taxation upon the property of the State bank was substantially equal to that upon the national bank, there was no ground to complain.

§ 296. Formal resolution not necessary for intentional discrimination.

But it is not necessary that the intention of the assessors to discriminate should be proved by formal resolution to that effect.

In another case in Ohio, in the Northern District,[1] it was said that there was nothing in the Kimball case which modified the principle declared in the Cummings and Pelton cases. While inequality of valuation arrived at by an erroneous mathematical calculation will not justify equitable relief any more than a result reached by the imperfect process of human judgment, yet, where the evidence shows upon its face that there is a systematic rule which necessarily discriminates, a court of equity has jurisdiction to relieve. It appeared in this case that there was a tacit understanding that all personal property should be valued at six-tenths of its actual value, but national banks were assessed at a larger per cent. The collection of the excess was restrained, although the assessment was imposed by the State Board of Equalization in the attempt to equalize national banks *inter sese* throughout the State. It seems that the average rate for national banks was sixty-eight per cent, while that of the State banks was fifty-nine per cent. The court added at page 757: —

"Certainly, the conspicuous and intelligent officials constituting this State Board of Equalization understood, as we do, that inequalities and discriminations were the necessary outcome of their 'rules;' and they found their justification, no doubt, and not unnaturally, in the decision of the State Supreme Court that, as long as they kept below the '*true value in money*' in all cases, there was no violation of the constitution and laws of the State of Ohio, and discriminations were immaterial. But they

[1] First Nat. Bank of Toledo *v.* Lucas County, 25 Fed. Rep. 749.

certainly overlooked the Act of Congress as interpreted by the Supreme Court of the United States. For, although their action in the premises did not necessarily, nor in fact, result in taxing any national bank at a valuation higher than its true value in money, as shown by the bank's own return, or, perhaps, not higher than its true value in money as shown by the selling prices in the market, it did result, as we can see in a general way, if we take the State of Ohio as the unit of locality in assessing the national banks, on the average, higher than the 'other moneyed capital' invested in State banks.'' [1]

§ 297. Difference in valuation of different classes of personalty not necessarily discriminative against national banks.

The difficulty in reaching for taxation intangible personal property has led to the adoption in the State of Maryland of a system of valuation of bonds and certificates of indebtedness, adjusted upon a sliding scale according to the rate of interest to be paid. Thus bonds bearing six per cent interest are assessed at fifty per cent of their face; those bearing five per cent at forty-one and two-thirds of their face, and so on. It was urged by a national bank that certain private bankers, whose business was in competition with national banks, were investing their capital in these securities, thus obtaining an advantage over national banks which were assessed at their full valuation equally with other property and with State banks and trust companies. The United States Circuit Court of Appeals [2] held that there was no discrimination within the meaning of the Act of Congress.

[1] See Chapter XVI on Equal Protection of the Laws in Valuation of Property for Taxation.

[2] National Bank of Baltimore *v.* Baltimore, 40 C. C. A. 254, 100 Fed. Rep. 24.

The court said that the term "moneyed capital," as used in the Act of Congress, has a restricted meaning. Wherever money is employed as money in carrying on a business the object of which is the making of profit, it is used as moneyed capital. There is nothing in the statutes of the United States relating to national banks which inhibits the States from differential taxation generally, and the fact that some property not shown to be an appreciable portion of the whole escapes taxation, furnishes no ground for relief. The court commented upon the vexed question of personal property taxation as follows, pp. 257–258: —

"The taxation of personal property has always and everywhere been a vexatious problem. Horses and cattle, wagons and carriages, the implements of husbandry and household furniture, — all things, in fact, which are visible, and cannot readily be concealed, including therein shares in incorporated companies which may be compelled by the law creating them to make returns, — are within comparatively easy reach of the tax assessors. But the great mass of personal property, in which the wealth of a country is invested, consisting of bonds and other evidences of credit, which can be readily hidden, escape the eye of the assessor, and nothing is more conclusively settled by human experience than that it is impossible to collect taxes upon this kind of property with any reasonable approach to accuracy or equality, and this is not for want of long sustained and earnest effort to accomplish it. There is a monotonous uniformity in the reports of the failures of every system attempted, however stringent may be the legislation, or however arbitrary or despotic may be the powers with which the assessors may be clothed. The heavy hand of the tax gatherer always falls upon the widow and the orphan, upon trustees and guardians, whose estates are required by law to be revealed to the courts of probate, and upon those only whose consciences are unusu-

ally scrupulous, and who, having least experience in business, are least able to bear the burden, while the most inadequate returns are invariably made by the rich, who are usually most ingenious in evasion and most fertile in expedients to escape taxation. The result is that always and everywhere no appreciable part of such intangible property is reached by laws, however ingeniously framed or severely enforced. The heavy and ever-increasing rate of taxation in our cities makes this result inevitable. Safe investments are rarely found which yield more than 4 per cent, and the rate of taxation being generally from 2 to 3 per cent, it is not to be wondered at that there should be endeavor to escape a burden which takes more than half of their income. Evasion and downright perjury is the consequence. The legislation complained of is the outgrowth of this state of things, which is not peculiar to the State of Maryland, but the lawmakers of that State, having in view that trait of human nature which impels the man of average honesty to be in matters of taxation about as honest as he thinks he can afford to be, have endeavored to bring hoarded wealth from its hiding, by the promise of taxation at a rate which would not be practically confiscatory, with the result that over $50,000,000 of property has been returned for taxation which had never before been brought to light. The exact figures are that before the passage of this act $6,481,047 was returned, the greater part of this amount belonging to trust estates, while in the year following $58,885,000 was returned for taxation; and the precise question now presented for determination is whether the valuation of this property for purposes of taxation at 30 cents on the $100 works such a discrimination against national banks that the courts should be compelled to declare this legislation void, as obnoxious to the provisions of the statute of the United States intended to prevent hostile discrimination against national banks."

The court concluded that the legislation was not inspired by any spirit of hostility to national banks and did not fall within the inhibition of the Act of Congress.

§ 298. Taxation of real estate of national banks.

The real estate of national banks wherever located, whether in the State of the bank's location or elsewhere, is taxable like other real estate. As already pointed out, there need be no deduction from the value of the shares of national banks on account of the value of real estate located and taxed in other States, *supra*, § 272. There is no provision in the Act of Congress requiring the deduction of the valuation of real estate located in the State of the location of the bank from the valuation of the shares. Where the laws of the State require the appraised value of the real estate of corporations to be deducted from the actual value of the shares before they are listed for taxation, national bank shareholders are entitled to the same deduction, and the denial of this right would be not only violative of the Act of Congress, but a denial of the equal protection of the laws.[1] It has been held in a number of State courts construing the laws of those particular States, that the assessed value of the real estate must be deducted from the valuation of the shares. Thus the Court of Appeals of Maryland[2] decided that the State can tax the real property or the shares of stock of a national bank but not both. The court said that it is not a mere metaphysical subtlety to say that the corporate property is represented by the shares of stock, and that it is substantially true that the taxes assessed on

[1] City National Bank *v.* Paducah, U. S. Circuit Court of Kentucky, 1 National Bank Cases 300.

[2] County Commissioners of Frederick County *v.* Farmers' & Mechanics' Bank, 48 Md. 117.

the property of the corporation are in reality paid by the shareholders and paid by them directly.[1]

It was held in Indiana, where the statute directed that the realty of national banks should be taxed like other realty and its value deducted from the capital stock, the shares of which must then be taxed to the holders, that the bank could not recover the taxes paid on its realty on the ground that the value of the realty had not been deducted from the capital stock, for the wrong in not making the deduction was done to the stockholders and not to the bank.[2]

In New York,[3] the State court, construing the New York statute, held that the assessor must deduct from the actual value of each share the sum bearing the same proportion thereto, as the assessed value of the real estate of the bank bore to the actual, rather than the nominal, value of the capital stock.[4]

In other States it has been held that, where the statute requires the shares to be taxed at their actual value without deduction for the real estate, this includes the taxation of the realty, which is accordingly exempt from unequal separate assessment.[5]

[1] On this point that double taxation of banks is effected by taxing both property and stock, see New Haven *v.* City Bank, 31 Conn. 106; Nichols *v.* N. H. & N. Co., 42 Conn. 103; People ex rel. *v.* Tax Commissioner, 69 N. Y. 91; Citizens' National Bank *v.* Loftin, 85 Ind. 341. But *contra*, upholding the right of double taxation, see City of Memphis *v.* Bank, 6 Baxter 415; Macon *v.* First National Bank, 59 Ga. 648.

[2] Board of Commissioners *v.* First National Bank, 57 N. E. Rep. (Ind.) 728.

[3] People ex rel. *v.* Tax Commissioner, 69 N. Y. 91.

[4] The statute in this case provided for deducting "from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank to the whole amount of the capital stock of the said bank."

[5] Board of Commissioners of Rice County *v.* Faribault, 23 Minn. 280. See also Lackawanna *v.* National Bank, 94 Pa. 221; County of Lancaster

§ 299. **Double taxation of national banks.**

These decisions of the State courts however, denying the right of double taxation by taxing the bank shares without deduction for the assessed value of the real estate, are based upon State laws. If the State allows the double taxation of other moneyed capital invested in corporate shares, through the taxation of both the corporate shares and corporate property, there is no prohibition in the National Banking Act requiring the deduction of the value of the real estate so as to avoid double taxation in the case of national banks.[1] There is no discrimination in double taxation if all of the same class are subject to it.

The Act of Congress protects against double taxation, as already shown, in the case of shares held by non-residents, by providing that such shares cannot be taxed in the State of the owner's domicil, but only at the location of the bank. There is no protection however against the incidental double taxation growing out of the ownership by the bank of real estate located in other States. The value of such real estate is included in the valuation of the shares of the bank, and is also assessed for taxation in the States where situated.

§ 300. **Enforcement of tax.**

Where the bank is made the statutory agent of the shareholders for the payment of the tax and the duty imposed upon it to pay the whole tax to the State, reimbursing itself from the shareholders, it has been held that the State may enforce the collection of the tax from the bank by the methods employed in other cases, *supra*, § 269.

v. Lancaster County National Bank, Common Pleas of Pennsylvania, 2 National Bank Cases 415.

[1] People's National Bank *v.* Marye (Cir. Ct. Va.), 107 Fed. Rep. 570, the court saying that this seemed to be the view of the Supreme Court in National Bank *v.* Commonwealth, 9 Wall. 353, l. c. 358.

Where the assessment is against the shareholder personally, without any statutory right to enforce payment from the bank, the State may employ the same remedies against the shareholders as against other delinquents in the payment of personal property taxes. Thus a stockholder in a national bank is bound to take notice of the time appointed by the statute for the hearing of complaints in regard to assessment of bank stock; and the proceeding by which the valuation is determined, though it may be followed, if the tax is not paid, by a sale of the delinquent's property, is due process of law.[1] Where the State statute authorizes not only distress and sale of personal property, but fine for misconduct for the non-payment of the personal property tax, such statute may be enforced against the delinquent national bank stockholder.[2]

§ 301. **Visitorial power of State over national banks.**

The State has the power to require the cashier of a national bank to furnish to the designated official a true list of the names of shareholders and the number of shares.[3] The court said that the national banks are subject to State legislation, except where such legislation is in conflict with some Act of Congress, or where it tends to destroy or impair the utility of the banks as agencies of the United States, or interfere with the purposes of their creation. It was no objection to such a law that the Act of Congress requires the national bank to keep a list of its stockholders posted up in its business office. The State has the right to pass such a law for the purpose of enforcing its taxation of the shares. It was objected that the purpose of the act

[1] Merchants' Bank *v.* Pennsylvania, 167 U. S. 461.

[2] Palmer *v.* McMahon, 133 U. S. 660, see *infra*, § 331. As to subjecting non-resident owners of shares in national banks to personal liability, see City of New York *v.* McClean, *infra*, § 398.

[3] Waite *v.* Dowley, 94 U. S. 527.

was to enable the towns of residence of the shareholders to tax them, and that this was invalid under the Act of Congress as it then stood. The court replied it could not determine that question until it was properly raised through an attempt to collect such a tax.

It is provided by the National Banking Act, Section 5241, that the banking associations shall not be subject to any visitorial powers other than such as are authorized by the act or are vested in the courts of the country. It was held in the United States Circuit Court of Ohio[1] that this section did not warrant an injunction against a proceeding under the State law of Ohio, in which the cashier was directed to produce the deposit books of the bank so that it could be ascertained whether any person had, at the date of assessment for taxation, any money on deposit subject to taxation in the county, which had not been returned by the owner for that purpose.

[1] First National Bank of Youngstown *v.* Hughes, 6 Fed. Rep. 737. But in a prior case between the same parties an injunction seems to have been allowed, see First National Bank of Youngstown *v.* Hughes, 2 Nat. Bank Cases 176.

CHAPTER X.

THE FOURTEENTH AMENDMENT.

§ 302. Occasion and immediate purpose of amendment.
303. Slaughter House Cases.
304. Privileges and immunities of citizens of United States.
305. Construction of amendment.
306. Amendment applies only to State action.
307. Protection not limited to citizens.
308. Corporations are "persons" under Fourteenth Amendment.
309. "Any person" and "any person within the jurisdiction" distinguished.
310. Application of amendment to State taxation.
311. Justice Field on Fourteenth Amendment and State taxation.
312. Circuit Judge Jackson on Fourteenth Amendment and State taxation.
313. "Due process of law" and "the equal protection of the laws" distinguished.
314. Fourteenth Amendment in State courts.
315. Substance and not form regarded in alleged violations of Fourteenth Amendment.
316. Fourteenth Amendment in condemnation for public purposes.

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

§ 302. Occasion and immediate purpose of amendment.

The restraints upon the State power of taxation discussed in the preceding chapters have been those growing out of the relation of the State to the Federal government, created by the Constitution of the United States. Prior to 1868 there was no guaranty in the Federal Constitution

of due process of law or the equal protection of the laws to the people of the States, except as against the power of the Federal government. Thus the first eight of the amendments, known as the Federal Bill of Rights, which were adopted immediately upon the ratification of the Constitution, having been made an implied condition of ratification in some of the States, have been uniformly construed as applying only to the Federal government and not to the States. There was then no appeal to the Federal courts against any violation by State power of equal protection of the laws in taxation, which did not involve an interference with national authority.

The Fourteenth Amendment has been called the child of the Civil War, but it may more accurately be said that it is the offspring of Reconstruction. It was framed by the Joint Reconstruction Committee of Congress in 1866, its ratification was exacted as a condition of the admission of the reconstructed States into the Union, and its adoption was proclaimed under the direction of a joint resolution of Congress during the angry political controversies of 1868.[1] The occasion and immediate purpose of the adoption of the amendment were doubtless the securing the results of the Civil War and protecting, through the national power, the recently emancipated negroes of the South.

The amendment contains in the first section a distinct declaration of what shall constitute citizenship of the United

[1] The validity of the adoption was at first disputed by the minority party in Congress on the ground that certain States had recalled their ratification before the result was proclaimed, and that Congress had no authority to make the ratification a condition of readmission of the reconstructed States into the Union. These questions however were never determined. See Miller's Lectures on the Constitution, p. 653. Although many cases have been before the Supreme Court involving the construction of the Fourteenth Amendment, in no one has any question been raised as to its ratification and incorporation in the Constitution.

States, and provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. This in effect overruled the decision in the Dred Scott case.[1] Other provisions related to securing the results of the war[2] and to the protection of the national debt from repudiation. In order to protect the newly emancipated race from the action of State governments, it was deemed necessary to extend the guaranty of the Federal Bill of Rights. It was therefore provided that no State shall make or enforce any law which shall abridge or impair the immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Owing to the circumstances attending the adoption of the amendment, the full import and scope of the concluding clause were not immediately realized,[3] and there was

[1] 20 Howard 1. This case held that persons whose ancestors were members of the African race imported into this country and held as slaves could not, though emancipated or born of parents who were free, become citizens of a State in the sense in which that word was used in the Constitution of the United States.

[2] See also *infra*, § 486.

[3] Thus Judge Cooley, in the first edition of his "Constitutional Limitations," published soon after the adoption of the amendment, says, p. 294: —

"The most important clause in the Fourteenth Amendment is that part of section 1 which declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. This provision very properly puts an end to any question of the title of the freedmen and others of their race to the rights of citizenship; but it may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the State constitutions. But as a principle of State constitutional law has now been made a part of the Constitution of the United States, the effect will be to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by State laws is complained of, inasmuch as the decisions of the State courts upon laws which are supposed to violate it will be subject to review in that court on appeal."

a disposition in the Supreme Court at first to limit the application of the guaranties of due process of law and the equal protection of the laws to the protection of the newly enfranchised race against hostile State legislation. Comparatively few cases however have been presented wherein these guaranties have been invoked for the protection of the class for whose benefit they were primarily intended. The gradual judicial recognition, as shown in the opinions of the Supreme Court, of the broad scope of these provisions of the Fourteenth Amendment in the protection of all persons, white as well as colored, corporate as well as individual, against any discriminating legislation, is a notable illustration of the developing power of our jurisprudence.

§ 303. Slaughter House Cases.

The amendment was first brought before the Supreme Court, in the Slaughter House Cases, in 1873, wherein an act of the State of Louisiana granting the exclusive right for twenty-five years to maintain slaughter houses in New Orleans was attacked as a monopoly, which, it was claimed, violated the privileges and immunities of citizens of the United States, and deprived them of their liberty and property without due process of law. The court, in a notable opinion by Justice Miller,[1] held that the privileges and immunities of citizens of the United States, not those of citizens of the State, are protected by the amendment, and that the privileges and immunities thus protected are those which arise out of the nature and essential character of the national government. The argument had not been much pressed in the cases, that the charter deprived the plaintiffs

[1] 16 Wall. 36, Chief Justice Chase and Justices Field, Swayne and Bradley dissenting.

of their property without due process of law, or that it denied to them the equal protection of the laws. The court said as to the guaranties of the amendment, page 80: —

"The first of these paragraphs has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government."

As to the equal protection of the laws, it was said, l. c. 81: —

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

"If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or

some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment."

In a later case from West Virginia, where the Fourteenth Amendment was invoked by a colored man on account of discrimination against negroes in the summoning of jurors, the court referred to the opinion in the Slaughter House Cases, saying: "If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally to carry out the purpose of its framers." [1]

§ 304. Privileges and immunities of citizens of United States.

As will be seen from the opinion in the Slaughter House Cases, the far-reaching importance of the last clause of the first section of the amendment, relating to "due process of law" and the "equal protection of the laws," was not then realized, nor were these provisions really involved in the question before the court, which turned essentially upon the meaning given to the term "privileges and immunities of citizens of the United States." What these are has not been definitely decided, although in subsequent cases this ruling has been adhered to. It was said in one case [2] that they are the privileges and immunities arising out of the nature and essential character of the Federal government and granted or secured by the Constitution of the United States. It has been strongly urged that they include the rights guaranteed by the first eight amendments of the Constitution which prescribe limitations to

[1] Strauder v. West Virginia, 100 U. S. 303.

[2] Duncan v. Missouri, 152 U. S. 382 and cases cited.

Federal power, such as the guaranty of the right to trial by jury and the securities against unreasonable searches and seizures, compulsory self-incrimination, quartering soldiers on the people in time of peace, excessive bail and cruel or unusual punishments. It has been said that if the rights of Federal citizenship include only those protected by the express and implied guaranties of the Constitution, such as free access to the seat of government, the right to the protection of the government on the high seas or in foreign parts and the right to use the navigable waters of the United States, that these rights are all protected against hostile State action and do not require the guaranty of this amendment. Thus Judge Cooley remarks:[1] "It may well be questioned whether the provision just considered was necessary. It is certainly not clear that there can exist any privilege or immunity of a citizen of the United States which, independent of the Fourteenth Amendment, is not beyond State control." But he adds that the provision has its importance in the fact that it embodies in express law what before, to some extent, rested in implication merely.[2]

§ 305. Construction of amendment.

But the distinction between the privileges and immunities of the citizens of the State and those pertaining to national citizenship is not material in the consideration of the limitations upon the State's taxing power under this amendment.

[1] Principles of Constitutional Law, 247.

[2] In O'Neil *v.* Vermont, 144 U. S. 361, Mr. Justice Field said in the dissenting opinion, concurred in by Justices Harlan and Brewer, that after much reflection he thought that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the Constitution of the United States; that the rights of persons declared or recognized in the amendments are rights belonging

The Fourteenth Amendment creates no rights; it only extends the guaranty of Federal protection to the rights already existing, whatever their origin, whether created by the State or not. All property rights whatsoever are protected by the guaranty of due process of law and the equal protection of the laws. The comparative importance of the provisions of this first section of the Fourteenth Amendment is illustrated by the fact that comparatively few cases have come before the Supreme Court on the question of the distinction between State and Federal citizenship, while the docket has been crowded with those involving the questions of due process of law and the equal protection of the laws. Only five years after the Slaughter House decision Justice Miller in delivering the opinion of the court[1] contrasted the "due process of law under the Fifth and Fourteenth Amendments," saying: —

"It is not a little remarkable, that while this provision (due process of law) has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded

to them under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon State power by ordaining that no State shall make or enforce any law which would abridge them. In this connection see the argument by John Randolph Tucker in the case of the Chicago Anarchists, Spies *v.* Illinois, 123 U. S. 131; and an interesting discussion by Mr. W. B. Guthrie in his lectures on the Fourteenth Amendment, pp. 62 to 65.

[1] Davidson *v.* New Orleans, 96 U. S. 97, 103.

with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law."

During the twenty-five years that have passed since these words were written, as the volumes of the court's opinions will show, not a term has passed in which some question involving due process of law or the equal protection of the laws has not been before the court for adjudication.

§ 306. **Amendment applies only to State action.**

It has been uniformly held that the prohibitions of the Fourteenth Amendment are addressed only to the States, and have no reference to *individual* invasion of private rights. It is under this amendment as under the clause of the Constitution prohibiting State impairment of the obligation of contracts, the Federal law can be invoked only where the action is by the State or under State authority.

But while this is true, yet the protection can be obtained, not against the political body called a State, but against any agency thereof, against any organization, association, official or individual acting under State authority. Thus the Supreme Court said:[1] —

"A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's

[1] Ex parte Virginia, 100 U. S. 339, 347.

power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

The prohibitions of the amendment refer to all the instrumentalities and authorities of the State. Thus a municipal ordinance enacted under legislative authority has the force of law in the municipality and is therefore State action within the prohibition of the amendment. Whatever the agency, where one acts in the name of or for the State, his act is that of the State.

This does not mean however that an erroneous decision of a State court, whereby the unsuccessful party loses his property, deprives him of such property without due process of law, where he has had a full hearing according to the regular course of judicial proceedings.[1]

§ 307. Protection not limited to citizens.

The broad application of the guaranties of due process of law and the equal protection of the laws is not confined to the protection of citizens, whether considered in relation to State or national citizenship. It extends to all persons, citizens and aliens, our own people and the strangers within our gates. This was the decision of the Supreme Court in a California case,[2] where it was held that Chinamen living in this country under provisions of the treaty were entitled to the protection of the Fourteenth Amendment; and the court said that the provisions guaranteeing due process of law and equal protection of the laws are "universal in their application to all persons within the territorial jurisdiction,

[1] Central Land Co. *v.* Laidley, 159 U. S. 103; Arrowsmith *v.* Harmoning, 118 U. S. 194.

[2] Yick Wo *v.* Hopkins, 118 U. S. 356, 369.

without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws " to all.

§ 308. Corporations are "persons" under Fourteenth Amendment.

It was not until 1886,[1] in the case of Santa Clara County *v.* Southern Pacific Railroad Company,[2] that it was definitely determined by the Supreme Court that corporations are persons within the provisions of the Fourteenth Amendment and are therefore entitled to "due process of law" and to the "equal protection of the laws."

Mr. Chief Justice Waite said, "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

In a recent case[3] the court said: —

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations, any more than they can be in respect to the individ-

[1] It had been assumed however, though not expressly decided, in Railroad Co. *v.* Richmond, 96 U. S. 529 (1877).

[2] 118 U. S. 394. This had been already decided in the U. S. Circuit Court of California in an elaborate opinion by Justices Field and Sawyer, 18 Fed. Rep. 385, and 9 Sawyer 165, 210. The ruling has been in many cases affirmed: Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181; Gulf, Colorado & Santa Fe R. R. Co. *v.* Ellis, 165 U. S. 154 and cases cited; Minneapolis *v.* Beckwith, 129 U. S. 26; Charlotte, etc., R. R. Co. *v.* Gibbes, 142 U. S. 386; Waters Pierce Oil Co. *v.* Texas, 177 U. S. 28.

[3] 165 U. S. 154.

uals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the laws than it has to individual citizens."

This right of the corporation, whether domestic or foreign, to due process of law and the equal protection of the laws does not affect the power of the State to exclude foreign corporations, other than those directly engaged in interstate commerce or in the employ of the Federal government, or to prescribe such conditions by way of license charges or otherwise as it may deem proper to impose upon their admission to do business in the State. But the effect of it is that, when admitted, they are entitled to the protection of these constitutional guaranties equally with others.[1]

§ 309. "Any person" and "any person within the jurisdiction" distinguished.

It will be noted that there is a difference in the language of the two prohibitions. A State must not deprive *any* person of life, liberty or property without due process of law, but the clause forbidding denial of the equal protection of the laws is limited to "any person *within its jurisdiction*." The Supreme Court said in a recent case [2] that it could not assume that these words "within its jurisdiction" were inserted in this connection without any object, nor was it at liberty to eliminate them from the Constitution and interpret the clause in question as though they were not to be found in that instrument, though it did not attempt to state what is their full import. It held however that where a Virginia corporation had sold goods to a corporation in Tennessee which subsequently became insolvent, and

[1] See *supra*, § 168.

[2] Blake *v.* McClung, 172 U. S. 239, 261.

had never been admitted to do business in Tennessee under conditions subjecting it to process issuing from the courts of that State, the vendor was not under this clause within the jurisdiction of the State of Tennessee, and could not therefore claim the equal protection of the laws under the Fourteenth Amendment, in the distribution of the assets of the insolvent purchaser.

§ 310. Application of amendment to State taxation.

The first application of the amendment to taxation was by the legislative department of the government in the Act of Congress of May 31, 1870, which has ever since been on the statute book as section 1977, Revised Statutes of the United States. The act provides as follows:—

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, *taxes*, *licenses*, *and exactions of every kind*, and to no other."

This act was passed under the authority of the fifth section of the amendment providing that "Congress shall have power to enforce by appropriate legislation the provisions of this article." It was a constitutional exercise of the power of Congress under the Fourteenth Amendment,[1] as it is directed against State and not individual action. The legislative prohibition, it will be seen, is aimed directly at discriminations against the colored race, declaring that all persons shall be subject to the same taxation as white citizens.

[1] Strauder *v.* West Virginia, 100 U. S. 303; Neal *v.* Delaware, 103 U. S. 370, p. 385.

The comprehensive character of the constitutional guaranties and their application to discriminating taxation was first judicially recognized in two notable opinions of Justice Field of the Supreme Court, sitting in the Circuit Court of California, and one by Circuit Judge Jackson, afterwards Justice of the Supreme Court, in the Northern District of Ohio. The first case was a suit brought to recover of the Southern Pacific Railroad Company State and county taxes for the years 1880 and 1881, and the defense was set up that the assessment, under the newly adopted constitution of California, which allowed a deduction from other property for mortgages thereon but forbade such deduction from railroad property, was an unjust and unlawful discrimination conflicting with the Fourteenth Amendment. The suit was brought in the State court and removed to the United States court. On motion to remand, it was held that the case involved a Federal question, the law at that time permitting a removal by the defendant on that ground.[1] On the trial upon the merits the assessment was adjudged invalid as violative of the Fourteenth Amendment by Justice Field, Justice Sawyer concurring.[2]

In the following year, another case involving substantially the same question was before the same court.[3] Justice Field, Justice Sawyer concurring, held these assessments invalid in an exhaustive opinion, which is an important contribution to the constitutional law of taxation. This opinion, though delivered on the circuit, is really the foundation opinion concerning the broad construction of the

[1] County of San Mateo *v.* So. Pac. R. R. Co., 13 Fed. Rep. 145.

[2] 13 Fed. Rep. 722, 733.

[3] County of Santa Clara *v.* So. Pac. R. R. Co., 18 Fed. Rep. 385, 397. This judgment was affirmed in the Supreme Court but on another point, 118 U. S. 395, the court holding that corporations are persons within the meaning of the Fourteenth Amendment, *supra*. But see the opinion of Justice Field in the Supreme Court, page 422.

Fourteenth Amendment and its application to discriminating taxation.

§ 311. Justice Field on Fourteenth Amendment and State taxation.

He said: "The amendment was adopted soon after the close of the civil war and undoubtedly had its origin in a purpose to secure the newly made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color, within the jurisdiction of the States throughout the broad domain of the republic. A constitutional provision is not to be restricted in its application because designed originally to prevent an existing wrong. Such a restricted interpretation was urged in the Dartmouth College case, to prevent the application of the provision prohibiting legislation by States impairing the obligation of contracts to the charter of the college, it being contended that the charter was not such a contract as the prohibition contemplated. Chief Justice Marshall, however, after observing that it was more than possible that the preservation of rights of that description was not particularly in view of the framers of the Constitution when that clause was introduced, said: —

"'It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the in-

strument, as to justify those who expound the Constitution in making it an exception.' 4 Wheat. 644.

"All history shows that a particular grievance suffered by an individual or a class, from a defective or oppressive law, or the absence of any law, touching the matter, is often the occasion and cause for enactments, constitutional or legislative, general in their character, designed to cover cases not merely of the same, but all cases of a similar, nature. The wrongs which were supposed to be inflicted upon or threatened to citizens of the enfranchised race, by special legislation directed against them, moved the framers of the amendment to place in the fundamental law of the nation provisions not merely for the security of those citizens, but to insure all men, at all times, and at all places, due process of law, and the equal protection of the laws. Oppression of the person and spoliation of property by any State were thus forbidden, and equality before the law was secured to all."

After quoting from Mr. Edmunds, who was a member of the Senate when the amendment was adopted by that body, as to the thorough discussion and scrutiny to which the language of the amendment was subjected before adoption, the opinion proceeded: —

"With the adoption of the amendment the power of the States to oppress any one under any pretense or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights — in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends everyone everywhere, whatever be

his position in society or his association with others, either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to a political body, or to a religious society, or be a member of a commercial, manufacturing, or transportation company. It is the shield which the arm of our blessed government holds at all times over everyone, man, woman, and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No State — such is the sovereign command of the whole people of the United States — no State shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no State, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the law.

"Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions, and the

cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel in the San Mateo case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read, as contended it does in law: 'Nor shall any State deprive any person of his property without due process of law, *except it be in the form of taxation;* nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.*' No such limitation can be thus ingrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws."

The Justice commented on the fact that the Act of Congress[1] expressly provides for equality of taxation, and proceeded: —

"The fact to which counsel allude, that certain property is often exempted from taxation by the States, does not at all militate against this view of the operation of the Fourteenth Amendment, in forbidding the imposition of unequal burdens. Undoubtedly, since the adoption of that amendment, the power of exemption is much more restricted than formerly; but that it may be extended to property used for objects of a public nature is not questioned, — that is, where the property is used for the promotion of the public well-being and not for any private end."

After stating that property held for religious and educational purposes was properly exempted from taxation, he continued: —

"Whatever the exemption, it can only be sustained for the public service or benefit received. The equality of pro-

[1] See *supra*, § 311.

tection which the Fourteenth Amendment declares that no State shall deny to any one, is not thus invaded. That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute only his just proportion to the general fund. When such exaction is made without reference to a common ratio, it is not a tax, whatever else it may be termed; it is rather a forced contribution, amounting, in fact, to simple confiscation."

§ 312. Circuit Judge Jackson on Fourteenth Amendment and State taxation.

In the Ohio case,[1] Judge Jackson held invalid an ordinance providing for street improvements in the city of Toledo, not only on the ground that it involved the taking of property without compensation first paid to the owner, but also because it authorized a special assessment without notice or opportunity to be heard, which was a taking of property without due process of law. The court declared that the Fourteenth Amendment was intended to place the same limitation upon the power of the State which the Fifth Amendment had placed upon the power of the Federal government, and that the same application was made in the matter of taxation. It is no longer an open question that the provisions of the Federal Constitution, prohibiting the State from depriving any person of his property without due process of law, apply to taxation by the State or by its subordinate agencies, and that, with respect to all such taxes based on values and apportionment and involving judicial or *quasi* judicial ascertainment and determination as to the amount to be imposed upon the citizen or made a charge upon his property, due process of law demands and requires that at some stage in the pro-

[1] Scott *v.* Toledo, 36 Fed. Rep. 385.

ceeding, before the tax charge is fixed and made final and collected, he shall have notice or an opportunity to be heard in reference thereto.

§ 313. "Due process of law" and "the equal protection of the laws" distinguished.

The requirement of "due process of law" or its legal equivalent "the law of the land," in its broader sense, may include all that is connoted by "equal protection of the laws." One who is injured by arbitrary or class legislation may justly claim that he is deprived of his property without due process of law, and so the term "due process of law" in State constitutions has been held to involve the prohibition of class legislation.[1]

The Supreme Court has not defined either "due process of law" or the "equal protection of the laws." As to the former phrase, it said,[2] l. c. p. 101: "It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law,' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States." Apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there was wisdom in ascertaining the intent and application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision should require, with the reasoning on which such decisions might be founded. The court[3] has recently declared that

[1] Sheppard *v.* Johnson, 2 Humphrey 285; Sutton *v.* Hate, 96 Tenn. 710.

[2] Davidson *v.* New Orleans, 96 U. S. 97, decided in 1877.

[3] Holden *v.* Hardy, 169 U. S. 389.

it had never attempted to define with precision the words "due process of law."

So also the court has declined to define with precision what is the "equal protection of the laws," though it is said that the equal protection of the laws is the pledge of the protection of equal laws.[1] And in a very recent case, holding invalid the anti-trust law of Illinois,[2] the court has repeated that both these two guaranties are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government.

But there has been a practical distinction observed in the application of the terms, which for convenience may be followed in analyzing the decisions. Due process of law is required in tax procedure, in the assessment and collection of taxes; and, in a broader sense, the taking of property by taxation under due process of law requires that the tax must be made for a lawful, that is for a public, purpose. On the other hand, the equal protection of the laws involves the question of what is a reasonable *classification* for taxation, in other words, to what extent equality of taxation is protected by the Federal power under the Fourteenth Amendment.

The practical distinction between due process of law and the equal protection of the laws is illustrated in a recent case in the Supreme Court, which is not however concerned with taxation. In Cotting *v.* Kansas City Stock Yards,[3] the act of the State of Kansas, regulating charges in public stockyards and applying only to the defendant corporation and not to other companies or corporations engaged in like business, was adjudged to be in violation

[1] Yick Wo *v.* Hopkins, 118 U. S. 356, 369.

[2] Connolly *v.* Union Sewer Pipe Co., 22 Sup. Ct. Rep. 431, decided March, 1902.

[3] 183 U. S. 79.

of the Fourteenth Amendment. The opinion of Justice Brewer, with whom concurred Chief Justice Fuller and Justice Peckham, was that the unreasonable rates imposed and the extreme and cumulative penalties, constituted a deprivation of property without due process of law; while the remaining six Justices, Harlan, Gray, Brown, White, Shiras and McKenna, concurred only in the second ground on which the decision was based, that the discrimination in the legislation, directed, as it was, against the defendant company alone, constituted a denial of the equal protection of the laws. In other words, the *arbitrary classification* constituted a denial of the equal protection of the laws, and these latter judges expressed no opinion upon the point whether the statute by its necessary operation would deprive the company of its property without due process of law.

§ 314. Fourteenth Amendment in State courts.

While the Federal government makes this guaranty of protection under the Fourteenth Amendment against the action of the State government or any one acting under State authority, it is an anomalous fact, illustrative of the dual sovereignty in our form of government and the complex character of our jurisprudence, that the final determination of questions of the violation of the amendment does not always rest with the Federal courts. Thus, under our peculiar judicial system, wherein the Federal courts in cases of adverse citizenship administer State laws and follow, as a rule, the decisions of the State wherein they have jurisdiction, the State courts also, in the lawful exercise of their powers, may decide Federal questions when presented for judgment, and their decisions may be final. Thus if a Federal right or immunity is claimed in a case before a State court, and the judgment of the highest court having jurisdiction in the State is in favor of the claimant, that decision of the State court is final and cannot be reviewed

on writ of error by the Supreme Court. This is because the Judiciary Act of 1789 [1] limits the appellate jurisdiction of the Supreme Court, in reviewing decisions of the highest courts of the States, to cases where the decision is against the Federal right, privilege or exemption claimed. In a number of cases therefore arising under the Fourteenth Amendment, decisions of State courts have been rendered, sustaining the claim of Federal right or exemption and adjudging State statutes to be invalid; and when these decisions involve the construction and application of the amendment, they are final within that jurisdiction. This power of the State courts exists, whatever the nature of the Federal right or claim, whether under the Fourteenth Amendment or otherwise.

An interesting illustration of this jurisdiction of the State courts to construe the Federal Constitution is found in a recent case in Missouri.[2] A constitutional amendment, duly ratified by the people, adopted what is known as the California plan of taxing mortgages as part of the real estate, allowing a deduction of the value of the mortgage to the owner, except in the case of railroads. The Supreme Court of the State held that this amendment violated the Fourteenth Amendment of the Constitution of the United States, because the exemption was an arbitrary classification. As the decision was thus in favor of the Federal immunity claimed in the suit, the decision of the State court, construing the Constitution of the United States, was final.

The same provision in the California constitution had been held by the Supreme Court of that State to be valid and not violative of the Fourteenth Amendment.[3] Thus by the decisions of the State courts construing the Federal

[1] 1 U. S. Statutes at Large, Chapter 20, section 25.

[2] Russell *v.* Croy, 164 Mo. 69.

[3] See Railroad Co. *v.* Board of Equalization, 60 Cal. 35.

Constitution, the same system of taxation was held valid in one State and invalid in another.

§ 315. Substance and not form regarded in alleged violations of Fourteenth Amendment.

In determining whether the Fourteenth Amendment has been disregarded by any of the agencies of the State, substance and not form merely will be considered. It was said in a condemnation case [1] that the mere fact of notice and opportunity for hearing does not necessarily decide the question as to whether there was due process of law. "A State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. The judicial authorities may keep within the letter of the statute, prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment." The State cannot make anything due process of law which by its own legislation it chooses to declare such. There must be "due process" in substance as well as in form.

On the other hand, the court has uniformly insisted that there must be a substantial failure to afford due process of law or the equal protection of the laws, before it will interfere especially with the *taxing* system established by the State. Essentials and non-essentials are carefully distinguished.[2] Courts are always reluctant to interfere with the taxing system established by legislative authority, and it has been repeatedly held that this applies with especial force to the Federal Supreme Court in its jurisdiction under this amendment. It must clearly appear that

[1] Chicago, Burlington & Q. R. R. Co. *v.* Chicago, 166 U. S. 226, 235.

[2] Castillo *v.* McConnico, 168 U. S. 674. See *infra*, § 338.

what the State is attempting to do violates the constitutional rights of the property owners.[1]

§ 316. Fourteenth Amendment in condemnation for public purposes.

The power to condemn private property for public uses is closely analogous to the power of taxation, and the broadened construction of the Fourteenth Amendment is illustrated in the decisions of the Supreme Court relative to its application to the exercise by the States of the former power. The Fifth Amendment to the Constitution, which, as above stated, applies only to the Federal government, provides not only that no person shall be deprived of life, liberty or property without due process of law, but also that private property shall not be taken for public use without just compensation. In Davidson *v.* New Orleans, *supra*, § 306, decided in 1877, Justice Miller, in delivering the opinion of the court, commented upon the fact that these words relating to the taking of private property for public uses, which are in immediate juxtaposition in the Fifth Amendment, are left out of the Fourteenth.[2]

In the California irrigation case in 1896,[3] the court again referred to this omission, saying that the States are not specifically prohibited by the Federal Constitution from taking private property for any but a public use. But it is claimed, said the court, that the citizen is deprived of his property without due process of law, if it be taken by or under State authority for any other than a public use either under the power of taxation or the right of eminent domain.

But later at the same term, in a condemnation case,[4] the

[1] King *v.* Mullins, 171 U. S. 404.

[2] But see remarks of Justice Bradley in this case, p. 107.

[3] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, l. c. 158.

[4] Chicago, Burlington & Quincy R. R. Co. *v.* Chicago, 166 U. S. 226.

court held unanimously that due process of law under the Fourteenth Amendment does protect the citizen in proceedings for condemnation, and requires not only that the use should be public, but that just compensation should be paid. It said, l. c. 241, that a judgment of the State court, even if it be authorized by statute, whereby private property is taken by the State, or under its direction, for public use, without compensation made or secured to the owner, is upon principle and authority wanting in the due process of law required by the Fourteenth Amendment to the Constitution, and the affirmance of such judgment by the highest court of the State is a denial by that State of the right secured to the owner by that instrument.

CHAPTER XI.

DUE PROCESS OF LAW IN TAXATION PROCEDURE.

§ 317. Due process of law is "the law of the land."
318. Due process of law in taxation does not require judicial hearing.
319. Notice and hearing not required in cases of licenses, etc.
320. Hearing not required where valuation is fixed by taxpayer.
321. Where amount of tax is dependent on valuation, hearing is required.
322. Notice and hearing in inheritance taxes.
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§ 317. Due process of law is "the law of the land."

"The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law," said Justice Miller,[1] in a notable opinion, "is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it

[1] Davidson *v.* New Orleans, 96 U. S. 97, 101.

was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment in 1866."

Due process of law in the Fourteenth Amendment means, as the same words in the Fifth Amendment were held to mean, "by the law of the land." The latter phrase in Magna Charta was said by Coke[1] to mean the "due course and process of the law."

The law of the land or due process of law usually implies and includes a regular course of judicial procedure, summons, hearing and judgment. In the famous words of Mr. Webster:[2] "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."

The definition of Justice Story[3] is more applicable to the "due process of law" in tax procedure: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights, as those maxims prescribe for the class of cases to which the one being dealt with belongs."

§ 318. Due process of law in taxation does not require judicial hearing.

Due process of law in taxation is that which is due and appropriate in that class of cases, that which in the experi-

[1] 2 Inst. 45, 50.

[2] From the argument in Dartmouth College Case, 4 Wheat. 518, 581.

[3] Story on Constitution, 5th Ed., Sec. 1945.

ence of our race in the enjoyment of self-government has been found due and appropriate.

Thus it has been uniformly held by the Federal and State courts, for substantially the same provision is in all the State constitutions, that due process of law in taxation does not require regular, nor indeed any, judicial procedure. This has been the ruling both before and since the adoption of the Fourteenth Amendment. Governments must have their revenues without delay at the times appointed, and obviously the collection cannot be postponed to wait the determination of a common law trial. They must from necessity proceed in a summary way.[1]

The leading and very illustrative case on this subject in the Supreme Court is Murray *v.* Hoboken Land Co.,[1] decided in 1855, holding that summary process by way of distress warrant from the United States Treasury against a defaulting collector, constituting a lien upon his real estate, was "due process of law" under the Fifth Amendment of the United States Constitution. The court, in an exhaustive opinion by Justice Curtis, holds that the term and its legal equivalent, "the law of the land," must be construed in the light of the common law, and the summary remedies authorized thereby in claims against public defaulters and in the collection of taxes. It said, page 282: "It may be added, that probably there are few governments that do or can permit their claims for public taxes, either on the citizen or on the officer employed for their collection or disbursement, to become subjects of judicial controversy according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of

[1] Bartlett *v.* Wilson, 59 Vt. 23.

[2] 18 Howard 272.

fines and penalties, but always in some way observed and yielded to."

The principle thus declared has been uniformly applied by the Supreme Court in cases where due process of law in the tax procedure of the States has been in question. In the first taxation case under the Fourteenth Amendment, it was said that due process of law in taxation does not mean by a judicial hearing. The nation from which we inherit the phrase itself has never relied upon the courts of justice in the collection of taxes, though she has passed through a successful resistance to unlawful taxation.[1]

In another taxation case,[2] it was said that taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceeding. The necessities of government, the nature of the duty to be performed and the customary usages of the people have established a different procedure, which in regard to that matter is, and always has been, "due process of law."

In another early case under the Fourteenth Amendment, the meaning of "due process of law" was exhaustively discussed, l. c. page 104, in a memorable opinion by Justice Miller.[3] He laid down the proposition: —

"That whenever by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings

[1] Justice Miller in McMillen *v.* Anderson, 95 U. S. 37.

[2] Justice Miller in Kelly *v.* Pittsburgh, 104 U. S. 78.

[3] Davidson *v.* New Orleans, *supra*, § 306.

cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.'' [1]

§ 319. Notice and hearing not required in cases of licenses, etc.

Due process of law in taxation is that which is due and appropriate, *i. e.* suitable to the nature of the case. In what are known as license, privilege or occupation taxes, and those imposed upon specific things, where the amount to be paid is fixed by law, and no valuation is required, hearing would be of no service, and therefore none is required.

Justice Field,[2] in the opinion already referred to, *supra*, § 311, says that the distinction between taxes upon licenses and taxes upon values is plain and everywhere recognized.

The same distinction was later made by the same judge in delivering the opinion of the Supreme Court in the California Drainage District Case,[3] l. c. page 708: —

"It is sufficient to observe here that by 'due process'

[1] Justice Bradley gave an opinion, concurring in the conclusion, but saying that he thought the opinion of the court narrowed the scope of the inquiry as to what is due process of law more than it should do. He thought that the court is entitled, under the Fourteenth Amendment, to see not only that there is some process of law, but due process of law; and in judging what is due process of law, attention must be given to the cause and object of the taking, whether under the taxing power, the power of eminent domain, the power of assessment for local improvement, or none of these. If found to be suitable and admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law. Such an examination may be made, he concluded, without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require.

[2] County of Santa Clara *v.* So. Pac. R. R. Co., 18 Fed. Rep., p. 409.

[3] Hagar *v.* Reclamation District, 111 U. S. 701.

is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. * * * Of the different kinds of taxes which the State may impose, there is a vast number of which from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter.

"If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors

appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law:

"In some States, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law."

§ 320. Hearing not required where valuation is fixed by taxpayer.

The principle, that due process of law in taxation does not require a hearing, where from the nature of the case it can be of no service, was applied by the United States Circuit Court in Virginia to the case of an assessment of shares in national banks. Under the act the assessment was made upon the market value of the shares as reported to the assessor by the bank, and the act itself fixed the amount of the tax upon this market value, so that the tax bills were self-executing and enforceable by levy. The court said that, as the bank itself fixed the market value and the statute the amount of the tax, the assessor's duty was a mere

ministerial one, and therefore the case was within the principle declared by the Supreme Court in Hagar *v.* Reclamation District, *supra*, § 319.[1]

§ 321. Where amount of tax is dependent on valuation, hearing is required.

But the court said in the California Drainage Case that, where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors upon such evidence as they may obtain, a different principle applies, and hearing at some stage is required. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with it altogether. In some tribunal, or before some official authorized to correct errors, the owner must be afforded an opportunity to be heard in respect to the proceedings under which his property is to be taken or burdened, and this must be at some time before the tax or assessment becomes final or effectual, in order to constitute such procedure due process of law.[2]

While the imposition of taxes is in its nature administrative and not judicial, assessors exercise *quasi* judicial power in arriving at the value, and opportunity to be heard as to value should be given and is given under all just systems of taxation.[3]

While this principle that some opportunity for hearing is necessary in taxing according to value, has been declared, it is noticeable that in no case has the Supreme Court declared the tax procedure of a State wanting in respect to the requisite notice and hearing, though numerous cases of

[1] People's National Bank *v.* Marye, 107 Fed. Rep. 571, l. c. 580.

[2] A leading case is Stuart *v.* Palmer, 74 N. Y. 183. See also Jackson, J., in Scott *v.* Toledo, *supra*, § 312, and Field, J., in Santa Clara Co. *v.* So. Pac. R. R., *supra*, § 311; Gatch *v.* Des Moines, 63 Iowa 718.

[3] Palmer *v.* MacMahon, 133 U. S. 660, 669.

alleged want of due process of law in assessment or collection of taxes have been presented to the court.

In several cases however the State courts have declared tax procedure void under the Fourteenth Amendment as wanting in this particular. Thus, in Virginia,[1] a city charter providing for an assessment for the city tax distinct from the assessment for the State tax and making no provision for correction or review of the city assessment, and a statute of Maryland,[2] requiring distillers and warehousemen to report spirits on hand, which were then valued by the official, but allowing no hearing or appeal, were both held void under the Fourteenth Amendment as wanting in due process of law. A statute of Ohio, providing for the summary seizure and killing of unlicensed dogs, was also held void as authorizing the taking of property without due process of law.[3]

§ 322. Notice and hearing in inheritance taxes.

It was held in Iowa,[4] that, as realty passing by will or inheritance vests immediately in the heir or devisee on the death of the owner, a law providing that real estate subject to an inheritance tax should be appraised after the appointment of an executor or administrator and the tax calculated on the appraised value, the property to be sold in the event of the tax not being paid by the person entitled to the estate, was unconstitutional as depriving the heir or devisee of property without due process of law, in that it authorized the fixing of the appraisement for taxation without notice or opportunity to be heard.

But the inheritance tax law of New York was held not

[1] Heth *v.* Radford, 96 Va. 272; Evans *v.* Fall River Co., 9 So. Dak. 130.
[2] Monticello Distilling Co. *v.* Baltimore, 90 Md. 417.
[3] Fagin *v.* Ohio Humane Society, 6 Nisi Prius 357.
[4] Ferry *v.* Campbell, 110 Iowa 290.

open to this objection, as it made sufficient provision for notice and hearing in determining the value of the estate.[1]

§ 323. Opportunity for rehearing or appeal to courts not required in valuation.

In some States, as in New York, the proceedings of a board of assessors or board of review in the valuation of property may be reviewed by *certiorari* or other form of procedure. The absence of such an opportunity however does not constitute want of due process of law. The taxpayer is deemed to have his day in court in the matter of the valuation of his property, if he is allowed an opportunity for hearing at any stage before the tax becomes final, whether before a *quasi* judicial board, or before any other tribunal provided by the State for the determination of such questions. It is no objection that the procedure is summary.

Neither does due process of law require any rehearing or retrial. The Supreme Court said in the Indiana railroad cases:[2] "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential in due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect." It was contended in this case that the valuation fixed by the board was not announced until shortly before adjournment, and that no notice was given of such valuation in time to take any steps for the correction of errors. But the court said that was immaterial, as one hearing before judgment was all that could be asked.

[1] In re Fuller's Estate, 71 N. Y. Supp. 40; see also Union Trust Co. *v.* Wayne Probate Judge, 125 Mich. 487.

[2] 154 U. S. 426; McLeod *v.* Receveur, 71 Fed. Rep. 455.

§ 324. Ruling of State court that hearing is required is conclusive.

While a party is entitled to a hearing as of right, that is, it must be given him as a matter of law, and not as a matter of favor, the construction by the State court of the State statute that such hearing is allowed by the statute is conclusive upon the Supreme Court.[1] In this, as in other cases, it is the statute as construed by the State court which must deny due process of law. Even where the statute itself makes no provision for a hearing, and the State courts hold that the taxpayer is entitled to it by virtue of the Constitution construed with the statute, the statute and the Constitution will be construed together, and there will be no denial of due process of law.[2]

§ 325. Personal notice of fixed public sessions of revision boards not required.

The requisite notice need not however be personal. It is sufficient that the board of review or other revising authority holds its sessions at stated times, when parties so desiring can be heard in relation to their assessments. Thus the court said in the Kentucky Railroad Cases,[3] that the meetings of the board of equalization were public and not secret. The time and place of holding them were fixed by law, and therefore there was in law both notice and hearing.

In another case,[4] involving assessments of national bank shareholders, the court said, l. c. page 466: "It is true the

[1] See Indiana Railroad Cases, *supra*, § 243.

[2] Kentucky Railroad Tax Cases, 115 U. S. l. c. 334.

[3] Kentucky Railroad Tax Cases, 115 U. S. 321; see also State Railroad Tax Cases, 92 U. S. 575, l. c. 609.

[4] Merchants' Bank *v.* Pennsylvania, 167 U. S. 461; Palmer *v.* McMahon, 133 U. S. 660; Hagar *v.* Reclamation District, 111 U. S. 701; American Transit Co. *v.* Thomas (Colo.), 63 Pac. Rep. 410; Streight *v.* Durham, 10 Ok. 361.

statute contemplates no personal notice to the shareholders, but that has never been considered an essential to due process in respect to taxation. The statute defines the time when the bank shall make its report to the auditor general, and it specifically directs him to hear any stockholder who may desire to be heard. The statute, therefore, fixes the time and place, for official proceedings are always, in the absence of express provision to the contrary, to be had at the office of the officer charged with the duties, and a notice to all property holders of the time and place of which the assessment is to be made, is all that due process requires in respect to the matter of notice in tax proceedings." It was further said that "the law in prescribing the time when such complaints will be heard, gives all the notice required; and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

This principle was applied in a recent case, where the Supreme Court reversed the Circuit Court of Appeals, Sixth Circuit,[1] and held that notice of the time and place of the first meeting of the State board for the equalization of assessments of bank shares under the Ohio law was sufficient notice to any banks which might be affected by its action, although such action should be taken at a meeting of the board after it had adjourned without fixing a date for a subsequent meeting. It seems that in this case the bank rested on the evidence it had returned to the Auditor. The board met and adjourned on Sept. 20, without fixing a date of meeting, and at a subsequent called meeting, held on Dec. 4, without notice to the bank, raised the assessment of its shares. The court said: "The board was a public tribunal, open to be invoked, and charged with duties, and

[1] Lander *v.* Mercantile National Bank of Cleveland, 22 Sup. Ct. Rep. 908, reversing Mercantile Nat'l Bank *v.* Hubbard, 45 C. C. A. 66.

necessarily subject to adjournments. What it had done the bank could easily have ascertained and as easily what it contemplated doing. An inquiry would have ascertained both. By the exertion of a very trifling trouble the bank would have been informed of every meeting of the board."

The effect of this ruling is to charge taxpayers with notice, not only of the regular and stated meetings of revising boards, but also of called meetings held at any time before their final adjournment. He must take notice that the board may increase his assessment at any such meeting, and is not bound to give him any notice that it contemplates any such action, that is, such increase does not violate the due process of law guaranteed by the Federal Constitution. As State revising boards usually meet at the State capital, this ruling in practical operation may deprive parties of the opportunity of showing that a proposed increase in assessments is unwarranted, as it seems that such increase may be made at a called meeting, when they have no opportunity of knowing that the meeting is to be held or that any increase in their assessments is contemplated.

§ 326. Provision for notice may be implied.

It is not necessary that a statute or ordinance should make express provision for notice to taxpayers, for what is implied in a statute is as much a part of it as that which is expressed. Accordingly where a statute or an ordinance provides for stated meetings of a board, designates the place at which the meetings are to be held and directs that all persons interested in the matter may be heard before it, it is implied thereby that suitable notice shall be given to the parties interested.[1]

The court, after saying that seemingly the final construc-

[1] Paulsen *v.* Portland, 149 U. S. 30.

tion placed by the State Supreme Court was to the effect that the charter required notice, added, l. c. page 38: —

"But were it otherwise, while not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature State, the council is its legislature, and the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council."

§ 327. Distinction between assessments for general and special taxation.

There is a distinction to be observed between assessments for the regularly recurring general taxation and those specially made for local improvements. The former are reviewed by a board of equalization which sits regularly at stated intervals, and of these sessions the taxpayer is bound to take notice, so that no special notice is required. Special assessments, on the other hand, are not made at regular intervals, but whenever the public necessity or convenience requires. The taxpayer therefore can not be charged with constructive notice of such proceedings and he must have some specific notice of the proposed charge against his property. This notice need not be personal, but may be sufficiently made by publication.[1]

[1] Lent *v.* Tillson, 140 U. S. 316; see *infra*, Chapter XIII, "Assessments for Local Improvements."

§ 328. Notice by publication.

In service by publication, which is sufficient in case of special assessments requiring notice in some form, the notice must be sufficiently full and clear to disclose to the taxpayer, supposing him to have ordinary intelligence, in a general way what is proposed. The time and place appointed must be such that with reasonable effort he will be able to attend and present his objections.

Thus, in a recent case,[1] it was held that ten days notice given by publication for three successive days was sufficient. The court said, at page 318, that perhaps the authority of the legislature to prescribe the length of time of notice is not absolutely beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as being ineffectual on account of the shortness of the time. How many days, it was asked, can the court fix as a minimum? It seems that in this case there had been a prior assessment which had been set aside, and the court said that, as the facts were known, ten days time did not seem unreasonably short for presenting objections to a reassessment. Notice had been published in the official paper, which the court said was proper, as the party interested would naturally look there for information.

In Lent *v.* Tillson, *supra*, the point was made that the notices were not published a sufficient number of days, because on some of the days they appeared in the supplement of some of the newspapers, rather than in the body where reading matter is usually found. But this objection the court said did not deserve serious consideration.

§ 329. Due process satisfied by opportunity for hearing at any stage of the proceeding.

It is immaterial when in the proceedings, whether by way

[1] Bellingham Bay, etc., Co. *v.* New Whatcom, 172 U. S. 314.

of reviewing the assessment, or in the collection of the taxes, hearing is allowed, provided it is allowed at some stage. Thus if the tax can only be collected by suit, and any defense can be pleaded going to the illegality or error in the assessment, this will be sufficient.[1] But it will not be sufficient, if the defenses are limited by statute, so that the question of error in the assessment cannot be considered. It was said by the Supreme Court however that as a matter of general jurisprudence, in the absence of any contrary provision in the statute, any defense would be admissible in the suit for collection which would establish the illegality of the assessment.[2]

It would seem however that an assessment that is unequal or excessive might be *erroneous*, when it would not be *illegal*, and that due process of law would require that the taxpayer should have his opportunity for hearing on the question of error in, that is, as to the amount of his assessment.

It was stated in a case from Louisiana that, where the statute gives the person against whom taxes are assessed a right to enjoin their collection and have their validity judicially determined, this is due process of law, although he is required, as are plaintiffs in other injunction cases, to give security in advance.[3] This however was a case of a license tax fixed by law upon the business of a liquor seller, and there seems to have been no occasion for any hearing for valuation.

§ 330. Collection of taxes through summary proceedings.

The collection of taxes belongs to the executive branch of the government, and the summary methods for enforce-

[1] Vanceburg & S. L. Turnpike Co. *v.* Maysville, 63 S. W. Rep. 749.

[2] Kentucky Railroad Tax Case, *supra*, § 325.

[3] McMillen *v.* Anderson, 95 U. S. 37; Oskamp *v.* Lewis, 103 Fed. 906.

ing such collections sanctioned by long experience constitute due process of law. The reasonable exercise by the legislature of a right of classification, to provide a summary process for the sale of property for delinquent taxes amounting to less than a stated amount does not deprive the taxpayer of due process of law.[1] Distress warrants for the collection of personal property taxes without prior notice or an opportunity to be heard are consistent with due process of law, as they were always known to the common law.[2]

§ 331. **Collection of taxes through distraint and seizure.**

Distraint and seizure of person for the collection of delinquent taxes are also consistent with due process of law. This was illustrated in a decision sustaining the New York statute, according to which the party failing to pay taxes on personalty was subject not only to distraint and sale of his personal property, but also to fine for misconduct. A national bank stockholder was prosecuted and convicted under this law, and ordered to stand committed until he paid the amount of the tax with interest and costs, unless the court should see fit sooner to discharge him. The Supreme Court affirmed the judgment [3] and said, page 669: —

" Collection by distress and seizure of person is of very ancient date, Murray's Lessee *v.* Hoboken Land Co., 18 How. 272; and counsel for defendant in error cites many English statutes, commencing with the twelfth year of Henry VII, c. 13, which in their essential features resemble the New York law upon the subject, one in 6 Henry VIII, c. 26, being strikingly like it. 2 Statutes of the Realm 644; 3 *Ib.* 156, 230, 516, 812; 4 *Ib.* 176, 334, 385,

[1] Sawyer *v.* Dooley, 21 Nev. 390.

[2] Nelson Lumber Co. *v.* McKinnon, 61 Minn. 219.

[3] Palmer *v.* McMahon, 133 U. S. 660, affirming 102 N. Y. 176.

744, 991, 1108, 1247; 5 *Ib.* 9, 700; 7 *Ib.* 567. Under the act of 1843 commitment is not resorted to until other means of collection have failed and then only upon a showing of property possessed, not accessible by levy, but enabling the owner to pay if he chooses, this constituting such misconduct as justifies the order. That law had been in existence for more than forty years at the time of this proceeding. We do not regard the collection in this way, founded on necessity and so long recognized in the State of New York as to be justifiably resorted to under the circumstances detailed in the act, and operating alike on all persons and property similarly situated, as within the inhibitions of the Fourteenth Amendment."

§ 332. Legislative discretion in imposing penalties on delinquents.

The infliction of penalties on delinquents is a usual and legitimate mode of compelling the prompt payment of taxes and is consistent with due process of law. The same principle of classification allowed to legislative discretion in the imposition of taxes, see *infra*, Chapter XV, is allowed in the enactment of penalties, and the amount of the penalties is a matter for the legislature to determine. This principle was applied by the Supreme Court [1] in sustaining a statute of Indiana imposing a penalty of fifty per cent of the amount of taxes unpaid upon telegraph, telephone, express and fast freight associations, while the general law of

[1] Western Union Telegraph Co. *v.* Indiana, 165 U. S. 304. But in a recent case, United States Trust Co. *v.* New Mexico, 183 U. S. 535, the court refused to enforce a penalty imposed by the laws of the Territory of New Mexico, for the non-payment of taxes levied upon railroad property in a foreclosure proceeding, on the ground that it was inequitable to charge interest or penalty until there was an identification of the property subject to taxation and a determination of the amount due. See also Litchfield *v.* County of Webster, 101 U. S. 773, where statutory interest in nature of penalty was denied on equitable grounds.

the State only imposed ten per cent for the first six months of delinquency and an additional six per cent for the second six months. The court said that the legislature might well have concluded that the ordinary remedies for the collection of taxes, distraint and sale, in the case of such companies would be open to the objection of interfering with the exercise of their functions, and this furnished a sufficient ground for the adoption of another mode of enforcing collections. Moreover the company, if it wished to contest the legality of taxes, could have paid them under protest and brought suit to recover back the money so paid.[1]

§ 333. Plenary power of State in assessments and reassessments.

In the assessment of property for taxation, the State may make the ownership subject to taxation relate to any day or days or period of the year which it may think proper, and the selection of a particular day, on which returns are to be made by the taxpayers of their property for the purposes of assessment, does not necessarily preclude the making of assessments as of other periods of the year. This was illustrated in a case from Ohio already cited,[2] where the statute provided for the assessment for taxation of the monthly average amount or value of the property or goods in which taxpayers were dealing. The court said, at page 600: "Of the right of the State of Ohio to make this provision we have no doubt. We know of no principle which forbids that State from taking the whole period of a business year already passed as the best means of ascertaining how much the taxpayer shall be required to pay on property which is admitted to be taxable, and how much he shall deduct for the non-taxable securities of the State and of the United

[1] Justices Harlan and White dissenting.

[2] Shotwell *v.* Moore, *supra*, § 37.

States." If property real or personal has been omitted from the assessment in any year, or if that actually assessed has been grossly undervalued in the assessment, the State has the right to have it assessed or re-assessed, as the case may be, and such action does not impair the constitutional rights of the property owner.[1]

In another case from Ohio the Supreme Court enforced a statute which empowered county auditors to issue compulsory process to bring before them persons who, they had reason to believe, were making false returns of property for the purposes of taxation, and to examine them under oath, and which authorized them also to extend their inquiries into returns of property for a period of four years next before that in which the inquiry was made.[2] The court said that a taxpayer has no vested right in the fruits of false returns, and that the act simply gave a new remedy to the State for enforcing a right which it already possessed.

Thus a statute of Minnesota was sustained by the Su-

[1] Douglas County *v.* Commonwealth, 97 Va. 397.

[2] Sturges *v.* Carter, 114 U. S. 511. This case was brought up on writ of error to the United States Circuit Court and no Federal question seems to have been raised; but the act was claimed to be in violation of the Ohio constitution which prohibited the passage of retroactive laws. In Co-operative Building & Loan Association *v.* State, 156 Ind. 463, the Supreme Court of Indiana sustained a statute giving tax officials the right to examine books and papers of taxpayers for the purpose of properly listing and assessing property for taxation, and issued a writ of mandamus against a Building and Loan Association to examine its books for evidence of property omitted from the tax list. The court said that the Fourth Amendment to the Federal Constitution against unreasonable searches and seizures operates upon the national government alone, and that the similar provision in the State statute was not violated, as there was nothing unreasonable in the requirement. "If the omission was accidental, the owner ought not to complain, and if intentional, he ought not to be heard except as to the proof of the supposed discoveries."

preme Court[1] which authorized the governor, when it should be made to appear that there had been any gross undervaluation of taxable property by the assessors for any county in the State, to appoint a board to revalue and reassess it. This board should, after examination, prepare a list of all such property for the year or years for which it was undervalued, the amount of the assessment and the actual and true value at which it should have been assessed. The statute further provided for the recovery of the tax upon this new assessment. It was claimed that this law gave the executive the power of setting aside the assessment without notice or opportunity to be heard. But this contention was not well founded, for the governor did not act judicially, but only started the inquiry, and the land-owner was allowed a defense before his land could be sold for taxes, because the tax was collected by suit. The only grounds of defense open to him in the suit were that the special facts authorizing the reassessment for past years did not exist and that the property had been reassessed partially, unfairly or unequally. The court held that this constituted due process of law, saying, at page 558: —

"If an officer omits to assess property or grossly undervalues it he violates his duty, and the property and its owners escape their just share of the public burdens. In Stanley *v.* Supervisors of Albany, 121 U. S. 535, we held that against an excessive valuation of property its owner had a remedy in equity to prevent the collection of an illegal excess. It would be very strange if the State, against a gross undervaluation of property, could not in the exercise of its sovereignty give itself a remedy for the illegal deficiency."

[1] Weyerhauser *v.* Minnesota, 176 U. S. 550, affirming 72 Minn. 519 and 68 Minn. 353.

In another case under the Minnesota statute, it was held[1] to be immaterial that the legislature did not provide at the same time for the assessment of back taxes on personal property. The legislature might well determine, in view of the stationary character of real estate and the probability of change in the title of personal property, that it was impracticable to proceed for back taxes in the case of the latter.

A statute of Indiana for the collection of back taxes on personal property was also sustained by the court.[2] The statute authorized the county auditor, when he had reason to believe that any real or personal property had been omitted from the assessment book, to correct the tax duplicate and add such property thereto. It was made the duty of every administrator or executor to pay the taxes due upon the property of the estate in his hands, and if he neglected to do so, having sufficient money on hand, it then became the duty of the county treasurer to present this matter to the court. An executor, who resided in New Hampshire and was visiting Indianapolis in the settlement of the estate, was served with notice by the auditor of an assessment for back taxes, amounting to over $60,000. The treasurer thereupon filed suit against him. The executor claimed that the statute was in violation of the Fourteenth Amendment, as he was a non-resident, that he was deprived of the property without due process of law, and that the court had no jurisdiction. The Supreme Court of Indiana held that he was an official resident at the time suit was commenced and therefore was within the statute.[3] The Supreme Court said that the method followed by the auditor in assessing the additional taxes was perhaps

[1] Winona & St. Peter Land Co. *v.* Minnesota, 159 U. S. 526. See also State *v.* Weyerhauser, 68 Minn. 353.

[2] Gallup *v.* Schmidt, 183 U. S. 300.

[3] 154 Ind. 196.

open to criticism, but that, as it was approved by the State courts, there was no question over which that court had jurisdiction. It is the settled law, the court declared, that, when it is asked to review taxation proceedings of the State courts, it must hold due process of law to have been afforded litigants if they have had an opportunity to question the validity or amount of the assessment or charge before the amount was determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is rendered. As the executor had his day in court in the suit to collect the tax, there had been due process of law.

§ 334. Legislative legalization of defective assessment held void.

While the State may re-assess property which has been defectively assessed, it can only do so through valuation, subject to the right of the taxpayer to a hearing, where hearing is required. A re-assessment cannot be made directly by legislative enactment. Thus in the State of New York, where the statute for the taxation of national bank shares had been declared illegal, the legislature passed an act attempting to validate the illegal assessments. It was held by the United States Circuit Court that the act was void.[1] The court said that the legislature could not "sanction retroactively such proceedings in the assessment of a tax as it could not have sanctioned in advance." The act permitted a review by *certiorari* upon the single ground that the assessment was at a higher proportionate value than other property on the same assessment roll assessed by the same officers. But the court said that the act was defective because it did not allow hearing upon the other grounds which are open to taxpayers generally, and that it was, in

[1] Albany City National Bank *v.* Maher, 9 Fed. Rep. 884.

effect, a legislative assessment of a tax upon a body of individuals selected out of a general class, without apportionment or equality between them and the general class, or between themselves, and without giving them any opportunity to be heard.

A subsequent curative act however was held valid, as it was made subject to the right of the parties interested to a hearing. It was held to be competent for the legislature to validate retroactively any tax proceedings which it could have authorized in advance. It is not necessary in such case that the hearing be secured before the assessment or collection of the tax. It is sufficient if reasonable provision is made for a hearing afterwards, so that there may be a correction of errors or a restitution of the taxes or the part of the tax unjustly imposed.[1]

An act of South Dakota, purporting to legalize retroactively an assessment in the taxation of all property within a certain county during certain years, was held unconstitutional, in so far as the legislature attempted to dispense with statutory notice to the taxpayer by a meeting of the board of equalization at the designated time and place and in the manner required by statute, since an opportunity to be heard at some stage of the proceedings is a condition precedent to the authorized seizure and sale of property for delinquent taxes.[2]

§ 335. Forfeiture of lands for taxes.

The forfeiture to the State and subsequent sale of lands for non-payment of taxes, with liberty to the owner upon due notice of the proceeding to intervene by petition and secure a redemption of his lands from the forfeiture by paying the taxes and charges, is not inconsistent with due

[1] Exchange Bank Tax Cases, 21 Fed. Rep. 99.
[2] Evans v. Fall River County, 9 S. Dak. 130.

process of law. The system established by West Virginia, which had been in force for many years before the organization of that State in Virginia, provided that lands liable to taxation should be forfeited to the State, if the owner should not have them placed in the proper land books for taxation and have himself charged with the taxes thereon for five consecutive years. The land, on petition filed by the representative of the State with the Circuit Court, was to be sold for the benefit of the school fund. The court held that this was due process of law.[1] It was urged that the landowner would be without remedy if the State should fail to institute proceedings for sale. But the court said that it could not be presumed that the commissioner would neglect to discharge a duty expressly imposed upon him, or that the courts were powerless to compel him to act when his action was necessary for the protection of the rights of the landowner. The argument of the plaintiff, the court said, proceeded upon the erroneous theory that all the principles involved in due process of law, as applied to proceedings strictly judicial in their nature, apply equally to proceedings for the collection of public revenue by taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character. The judiciary should be very reluctant to interfere with the taxing system of a State, and should never do so unless that which the State attempts is a palpable violation of the constitutional rights of the property owners.

But a statute of Maine, requiring owners of lands sold for the non-payment of taxes to deposit with the clerk of the court the amount of all the taxes, interest and costs accrued up to that time, before they could be admitted to

[1] King *v.* Mullins, 171 U. S. 404; see also State *v.* Sponaugle, 45 W. Va. 415, and 43 L. R. A. 727; State *v.* Cheney, 45 W. Va. 478.

test the validity of the tax or sale, was held void by the Supreme Court of Maine, as depriving them of their property without due process of law.[1] It was held in New York that where the defect in the original imposition of the tax is of so jurisdictional a character as to be beyond the reach of a curative legislative act, as where a tax levy was void because the sum was assessed in the name of one who was not the owner or occupant of the land, the original owner is not precluded from asserting his title by a statute making the deeds of a comptroller upon the tax sale, after the lapse of a certain time, conclusive evidence of the sales, and all proceedings prior thereto valid.[2]

§ 336. New remedies for collection of taxes may be adopted.

The State may adopt new remedies for the collection of taxes and apply them to taxes already overdue without a violation of the Federal Constitution. The delinquent taxpayer has no vested right in any existing mode of collecting taxes, and there is no contract between him and the State that the latter will not vary the mode of collection. This principle was applied by the Supreme Court, in a recent case, to the Texas act of 1897 for the collection, by judicial proceedings, of taxes on real estate.[3] The lands in this case had been purchased by the State under the laws then in force. Whether the title acquired by the sale was conditional or absolute, the State could waive the rights conveyed by such sale and prescribe terms upon which it would waive them, and the taxpayer could not complain because he was charged with the ordinary fees and expenses of the lawsuit. The State could moreover provide that taxes, which had already

[1] Bennett *v.* Davis, 90 Me. 102.

[2] Hagner *v.* Hall, 10 App. Div. N. Y. 581.

[3] League *v.* Texas, 22 Sup. Ct. Rep. 475, affirming 93 Texas 553.

become delinquent, should bear interest from the time that the delinquency commenced. Such a provision did not come in conflict with the Federal Constitution merely because it was retroactive, for the State can enact retroactive laws, provided they are not *ex post facto* in a technical sense and do not impair the obligation of a contract. The Fourteenth Amendment has not changed the rule in that respect. As the State can in the first instance enact that taxes shall bear interest from the time they become due, so, without conflicting with any provision of the Federal Constitution, it may in like manner provide that the taxes which have already become due shall bear interest from the time the delinquency commenced. This is adding no extraordinary penalty, for interest is the ordinary penalty for non-payment of obligations.

§ 337. Effect of statutory conclusiveness of tax deeds.

The very strong disposition of the Supreme Court to sustain the tax procedure of the States is evidenced by its rulings in cases where title has been claimed under tax deeds, when it has followed the decisions of the State courts as to the construction of the State statutes. Thus, in affirming a judgment of the United States Circuit Court of Oregon in an ejectment suit,[1] it held that a State legislature might competently declare that a tax deed should be *prima facie* evidence both of the regularity of the sale, and also of all prior proceedings and of title in the purchaser, but that the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that may be, conclusive of its own validity, and cannot therefore make the tax deed conclusive evidence of the holder's title to the land.[2]

[1] Marx *v.* Hanthorn, 148 U. S. 172.

[2] Citing Cooley on Taxation, 521, 2nd ed. 1886. See also Bannon *v.*

In a later case involving a tax title in Louisiana, where the act made the tax deed conclusive of the sufficiency of the assessment, it was claimed that, under the decision in Marx *v.* Hanthorn, this was a want of due process of law. But the court declared[1] that Marx *v.* Hanthorn came up from the Circuit Court of the United States, which followed the construction given to the tax laws of the State from which the case came by the Supreme Court thereof; and that it was not enough to make a Federal question in a case brought up from the State Supreme Court to show that that court proceeded on a statutory conclusive presumption. The party must go further, and show that he was actually deprived of his property by means of that presumption, that is, the party complaining of it must show that if the presumption had not been entertained the assessment would have been shown to be invalid; for complainant's right was limited to the single inquiry whether in the case which he presented the effect of applying the statute was to deprive him of his property without due process of law. The court therefore looked into the alleged defects, disregarding the statutory presumption, and held that without it the defects were insufficient to sustain the claim of want of due process.

A statute making a tax deed *prima facie* evidence of certain matters therein specified and providing that a judgment for a tax deed should be conclusive evidence of its regularity and validity in collateral proceedings, excepting in cases where the taxes had been paid or the real estate was not liable, was held valid by the Supreme Court of Washington as a proper exercise of legislative power and not amounting to a taking of property without due process

Burnes, 39 Fed. Rep. 892 and Ball *v.* Ridge Copper Co., 118 Mich. 7. As to the conclusiveness of recitals in bonds issued for public improvements, see Ramish *v.* Hartwell, 126 Cal. 443.

[1] Castillo *v.* McConnico, 168 U. S. 674.

of law. The court decided also that when a property owner has notice and an opportunity to defend before his title is actually divested by the delivery of a tax deed, the issuance without notice to him of a tax certificate, which the statute declares shall have the same force and effect as a judgment, execution and sale, will not constitute the taking of property without due process of law.[1]

§ 338. Essentials only considered in reference to due process of law.

The principle has been uniformly declared that substance and not form, essentials and not non-essentials, are to be considered in determining whether there is due process of law in tax procedure. This principle was well illustrated in Castillo *v.* McConnico. The court there held that the defects complained of were all non-essential. Adding to the name of the masculine owner in the advertisement the words "or her estate and heirs" did not destroy the efficacy of the advertisement, and the State had the power, without violating the requirement of due process of law, to dispense with the name in the assessment, substituting any such description and method as would have been legally adequate to convey either actual or constructive notice to the owner. It added at page 683: —

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a State assessing or taxing law. The two are neither correlative nor coterminous. The first, due process of law, must be found in the State statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the law-mak-

[1] State *v.* Whittlesey, 17 Wash. 447.

ing power of the State, and as it is solely the result of such authority may vary or change as the legislative will of the State sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the State statute, is a State question within the final jurisdiction of courts of last resort of the several States. When, then, a State court decides that a particular formality was or was not essential under the State statute, such decision presents no Federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the State interpretation of its own law is controlling and decisive."[1]

§ 339. **Limitation and curative statutes.**

The State has the constitutional power to enact statutes of limitation relating to tax titles as well as to any other matter, provided that, as to existing rights of action, the limitation gives the claimant a reasonable opportunity to enforce his rights by suit.[2]

Thus a statute of New York provided that deeds from the Comptroller of the State for lands in the forest reservation sold for the non-payment of taxes should, after being recorded for two years, in any action brought more than six months after the act took effect, be conclusive evidence that there was no irregularity in the assessment of the taxes. This was a statute of limitations, and did not de-

[1] As to the distinction between essentials and non-essentials, see also Lent *v.* Tillson, 140 U. S. 333, 334.

[2] Wheeler *v.* Jackson, 137 U. S. 245, 257.

prive the former owner of his property without due process of law.[1]

It was held in Virginia[2] that a law enacted to give purchasers confidence in the sufficiency of tax titles and thereby to promote the most efficient means to collect the delinquent taxes, and which gave to the land-owner the absolute right of redemption for two years after his land had been sold for the taxes, could not be said to be in contravention of the Fourteenth Amendment, because it cut off all defenses, except that the taxes were not chargeable or had been paid.

A statute of Iowa, providing that a claimant under a tax deed should be barred if he did not sue for or take possession of the land within five years after the deed was executed and recorded, was held valid.[3]

But a limitation statute, providing that no action for recovery of land sold for taxes shall be maintained unless the plaintiff or his predecessor in title was possessed of the lands within two years next preceding the commencement of the action, if construed to bar a suit when the tax sale appears on the face of the proceedings to have been void and made without authority of law, is not consistent with due process of law.[4] This was the ruling of the United States Circuit Court of Appeals, Eighth Circuit, in reference to the statute of Arkansas, which the court construed however as not depriving the owner of his right to recover possession where the tax proceedings were void. The court said (41 C. C. A. l. c. page 233): "It is undoubtedly competent for the legislative department to enact reason-

[1] Saranac Land & Timber Co. *v.* Comptroller of New York, 177 U. S. 318. Following Turner *v.* New York, 168 U. S. 90.

[2] Virginia Coal Co. *v.* Thomas, 97 Va. 527.

[3] Barrett *v.* Holmes, 102 U. S. 651.

[4] Alexander *v.* Gordon, U. S. Cir. Ct. of App., 8th Cir., 101 Fed. Rep. 92, and 41 C. C. A. 228.

able statutes of limitation, to provide that the adverse possession of lands for a reasonable time under a tax or judicial sale shall cure the mere irregularities in the proceedings upon which it rests. But a provision that the possession of land for the limited term of two years under a purchase at a tax sale which clearly appeared upon its face to be void because the officer who made it had no jurisdiction or authority to effect it, and because it was made for taxes levied in excess of the limit prescribed by the law, is not process of law, but is a mere legislative fiat and in violation of the fundamental principle of our jurisprudence. If this was the purpose and intent of the legislature of Arkansas in the passage of this act of limitation, the law could not be sustained."[1]

[1] For opinion of the Supreme Court of Arkansas on the same statute see Woolfork *v.* Buckner, 60 Ark. 163, 167.

CHAPTER XII.

DUE PROCESS OF LAW AND THE PUBLIC PURPOSE OF TAXATION.

§ 340. Public purpose essential in taxation.
341. Loan Association *v.* Topeka.
342. Municipal bonds held invalid for want of public purpose.
343. Public purpose of taxation under Fourteenth Amendment.
344. Supreme Court on Loan Association *v.* Topeka.
345. City taxation of annexed farming lands sustained.
346. What is public purpose for taxation?
347. Conflicting judicial opinions as to public purpose necessary for taxation.
348. Erection of public sorghum mills not public purpose.
349. Inspiration of patriotism lawful public purpose.
350. Taxation for public ownership.
351. Public purpose in eminent domain.
352. Any proceeding dependent upon taxation for private purpose invalid.
353. Railroad aid bonds.
354. Purpose of taxation must not only be public but pertain to district taxed.

§ 340. Public purpose essential in taxation.

Due process of law in taxation requires more than customary tax procedure. A tax has been defined as a contribution enforced by the sovereign authority of the State, according to some rule of apportionment, upon persons and property within its jurisdiction, for the support of government or other public needs. Due process of law in State taxation therefore requires that the tax shall be levied for a public purpose and upon persons or property within the jurisdiction of the State. This conception of a tax was not created by the Fourteenth Amendment but inheres in the nature of a tax, as it is understood in the jurisprudence of the political communities which make up our political sys-

tem. As to the Fourteenth Amendment in relation to these fundamental principles, the Supreme Court has said [1] that due process of law refers to that law of the land in each State which derives its authority from the inherent and reserve powers of the State, exerted within the limits of those fundamental principles of liberty and justice, which lie at the basis of all our civil and political institutions, and the greatest security for which rests in the right of the people to make their own laws and alter them at pleasure. But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is to be too vague and indefinite to act as a practical restraint. It is not every act legislative in form that is law. Law is something more than mere will exerted as an active power. Arbitrary power enforcing its edicts to the injury of the persons and property of its subjects is not law.

As taxation belongs to the legislative power, the determination of the public purpose for which taxes shall be levied is primarily a matter for the legislature, but this power is not unlimited. The fundamental principle that taxes can be levied only for public purposes had been declared in the State courts long before the adoption of the Fourteenth Amendment and irrespective of any express constitutional declaration. The constitutions of some of the States provide in express terms that taxes shall be levied for a public purpose only, but such declaration is unnecessary, as a public purpose is implied in the conception of a tax.[2]

[1] Hurtado *v.* California, 110 U. S. 516, l. c. p. 535.

[2] In some early cases this implied limitation upon the power of taxation was based upon the constitutional provision prohibiting the taking of private property for public use without just compensation, see Cheaney *v.* Hooser, 9 B. Monroe 330, p. 341, cited and followed in Wells *v.* Weston, 22 Mo. 384, 389, see *infra*, Sec. 345*n*; City of Covington *v.* Southgate, 15 B. Monroe 491.

That a public purpose is inherent in a tax is further illustrated by the fact that the leading case in the Supreme Court, and indeed in our jurisprudence, on the subject of the public purpose essential in taxation, to wit, that of Loan Association *v.* Topeka,[1] was not considered or decided with reference to the Fourteenth Amendment, but on principles of general constitutional law. That decision was rendered by the court in the exercise of its appellate jurisdiction over the Circuit Courts, in a suit brought before the Circuit Court for the District of Kansas on bonds issued to an iron works company by the city of Topeka to aid in their establishing bridge shops in that city.

§ 341. Loan Association *v.* Topeka.

The bonds were issued under authority of an act of the legislature, authorizing certain cities "to encourage the establishment of manufactures and such other enterprises as may tend to develop or improve the city, either by direct appropriation from the general funds, or by the issuance of the bonds of such city." A majority vote at an election was required. It seems that all the steps were taken, including the election, the bonds were issued and the first interest coupon paid. In a suit upon the coupons in the United States Circuit Court of Kansas, the defense demurred on the grounds, first, that the statute violated the constitution of Kansas, and second, that the act authorized the towns to take the property of the citizens under the guise of taxation, in aid of enterprises which were not of a public nature. The Circuit Court sustained the demurrer, and the judgment was affirmed by the Supreme Court, in a notable opinion by Justice Miller.

The court declined to pass upon the first point, as to whether the statute was authorized by the constitution of

[1] 20 Wallace 655.

the State, saying that, as it found ample ground to sustain the demurrer on the second, it preferred to base its decision upon that. As the contract could only be fulfilled by resorting to taxation, its validity necessarily depended on the power to levy the tax. The court referred to the judicial conflict over railroad aid bonds, and said that such bonds had been sustained on the ground that the purpose was in effect a public one. A law authorizing a tax for a purely private purpose is an unauthorized invasion of private rights. The opinion continued, page 662: —

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservation of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband wife to each other should be

so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.

"Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the National defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of people. It was said by Chief Justice Marshall, in the case of McCulloch *v.* The State of Maryland, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called

taxation. This is not legislation. It is a decree under legislative forms.

"Nor is it taxation. A 'tax,' says Webster's dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State.' 'Taxes are burdens or charges imposed by the legislature upon persons or property, to raise money for public purposes.'"

After conceding that it is not easy to decide in all cases what is a public purpose, and that the courts are justified in interposing only where the case is clear, it was said, page 665: —

"In deciding whether, in the given case, the object for which the taxes were assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

But it was said that, in the case at bar, no line could be drawn in favor of the manufacturer, which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.[1]

[1] Justice Clifford dissented on the ground that the courts had no power to declare an act of the State Legislature void if it was not repugnant to the constitution of the State or the Constitution of the United States, and could not declare it void on the vague ground that they thought it opposed to the general spirit supposed to underlie the Constitution.

§ 342. Municipal bonds held invalid for want of public purpose.

This case was followed in others from the Circuit Courts, none of them however making any reference to the Fourteenth Amendment. Thus in Cole *v.* LaGrange,[1] a suit on bonds issued to a manufacturing company in Missouri, the court said that the general grant of legislative power in the constitution of the State did not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property without the owner's consent for any but a public purpose; nor can the legislature authorize municipal corporations to contract, for private objects, debts which must be paid by taxation. These limits of legislative power were too firmly established by judicial decisions to require extended argument and citations.[2]

Bonds however issued under a statute of Kansas to aid in the subscription to a custom grist mill were held valid,[3] on the ground that a grist mill run by water was a public use, as declared under the laws of Kansas.[4]

But in a later case from Nebraska,[5] the court held that the act of Nebraska did not authorize the issue of bonds

[1] 113 U. S. 1.

[2] See also Parkersburg *v.* Brown, 106 U. S. 487.

[3] Burlington Township *v.* Beasley, 94 U. S. 310, Justice Field dissenting.

[4] The court said in this case at page 313: "A mill run by water is declared to be an internal improvement by the statute we are considering. It would require a great nicety of reasoning to give a definition of the expression 'internal improvement' which would include a grist mill run by water and exclude one operated by steam, or which would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be poor consolation to the people of this town to give them the power of going in and out of the town by railroad, while they were refused the means of grinding their wheat;" citing County *v.* Miller, 7 Kansas 479. See also Blair *v.* Cuming Co., 111 U. S. 363.

[5] Osborne *v.* Adams County, 106 U. S. 181.

for the benefit of a steam grist mill, and the bonds were held void.[1]

The above were all suits upon municipal bonds brought in the United States Circuit Court and decided with no reference to the Fourteenth Amendment. In nearly all, the decisions were based upon the rulings of the State courts. Justice Miller in Davidson *v.* New Orleans, *supra*, § 306,[2] speaks of the decision in Loan Association *v.* Topeka as decided upon "principles of general constitutional law" of which the court could take jurisdiction when sitting in review of a Circuit Court of the United States, but of which it could not take jurisdiction in reviewing upon a writ of error a judgment of a State Supreme Court.

§ 343. Public purpose of taxation under Fourteenth Amendment.

Later decisions of the court however have distinctly referred the basis of the decision in Loan Association *v.* Topeka to the "due process of law" secured by the Fourteenth Amendment, and have questioned the power of the court to invalidate on any other ground a State tax as wanting in a public purpose, when held valid by the State courts.[3]

Thus in Hurtado *v.* California, where Justice Matthews for the court, in an exhaustive opinion and discussion of the meaning of due process of law and the Fourteenth Amend-

[1] The Supreme Court of Nebraska in Traver *v.* Merrick County, 14 Neb. 327, held that there was a distinction between aiding in the development of the water power of the State through the assistance of mills run by water power, and aiding the mills propelled by steam which could at any time be moved to another locality. See also Osborne *v.* Adams County, 109 U. S. 1, on motion for rehearing.

[2] 96 U. S. 97, l. c. 105.

[3] Hurtado *v.* California, 110 U. S. 516; Maynard *v.* Hill, 125 U. S. 205; Fallbrook Irrigation District *v.* Bradley, 164 U. S. 155; Missouri Pacific R. R. Co. *v.* Nebraska, 164 U. S. 403.

ment, holds that it does not necessarily require an indictment by a grand jury in a State prosecution for murder, that learned Justice cites and quotes from the opinion in Loan Association *v.* Topeka as illustrative of "the law of the land," which is guaranteed by "due process of law," and which there constituted a protection against arbitrary power.

In Missouri Pacific Railroad Company *v.* Nebraska, the court, at page 417, cites Loan Association *v.* Topeka in support of the proposition that "the taking by a State of the private property of one person or corporation without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

§ 344. Supreme Court on Loan Association v. Topeka.

In the California irrigation case,[1] the Supreme Court of California had adjudged that the purpose of the assessment was public. But it was contended that the United States Supreme Court was not concluded by this and had the power "under general constitutional law" to determine whether the purpose was public or private. The court held however that it could only review the decision of the State court on this question, to determine whether the assessment was valid under the Fourteenth Amendment, and that it could not overrule the State court on principles of general constitutional law, saying, at page 155: —

"We should not be justified in holding the act to be in violation of the State constitution in the face of clear and repeated decisions of the highest court of the State to the contrary, under the pretext that we were deciding principles of general constitutional law. If the act violate any provision, expressed or properly implied, of the Federal

[1] Fallbrook Irrigation District *v.* Bradley, *supra.*

Constitution, it is our duty to so declare it; but if it do not, there is no justification for the Federal courts to run counter to the decisions of the highest State court upon questions involving the construction of State statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law. The contrary has not been held in this court by the case of Loan Association *v.* Topeka, 20 Wall. 655. In that case a statute of Kansas was held invalid because by its provisions the property of the citizen under the guise of taxation would be taken in aid of a private enterprise, which was a perversion of the power of taxation. The case was brought in the United States Circuit Court for the District of Kansas, and was decided by that court in favor of the city. There had been no decision of the highest State court upon the question whether the act violated the constitution of Kansas, and consequently there was none to be followed by the Federal court upon that question. This court held that a law taxing the citizen for the use of a private enterprise conducted by other citizens was an unauthorized invasion of private rights. Mr. Justice Miller said that there were such rights in every free government which were beyond the control of the State. The ground of the decision was as stated, that the act took the property of the citizen for a private purpose, although under the forms of taxation. In thus holding, there was no overruling or refusing to follow the decisions of the highest court of the State respecting the constitution of its own State.

"We are, therefore, practically confined in this case to the inquiry whether the act in question, as it has been construed by the State courts, violates the Federal Constitution."

It was held that the assessment was for a public purpose sufficient to constitute due process of law.

§ 345. City taxation of annexed farming lands sustained.

The doctrine of Loan Association *v.* Topeka was unsuccessfully invoked in the case of Kelly *v.* Pittsburgh,[1] where the defendant had extended its boundaries under authority of an act of the legislature of Pennsylvania, by the annexation of adjacent territory. There was included a tract used exclusively for farm purposes, and which, on account of its distance from the built-up portion of the city, was not within the reach of the water, fire, police or other departments of the municipal government. The plaintiff complained that the estimate of his land for taxation was greatly in excess of its true value, and that the city tax was almost destructive of his interest in the property. The Supreme Court of Pennsylvania sustained the validity of this tax,[2] and their judgment was affirmed by the Supreme Court of the United States. Justice Miller, delivering the opinion, said that the cases cited from Kentucky and Iowa, where it had been held that farm lands in a city were not subject to ordinary city taxes, were not applicable and afforded no rule for construing the Constitution of the United States. It might be true that the plaintiff did not receive the same amount of benefit from some of these taxes as citizens living in the heart of the city, and probably his tax bore a very unjust relation to the benefits received. The court however added, p. 82: —

"But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them?

"We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not

[1] 104 U. S. 78.

[2] A strong dissenting opinion was filed in Pennsylvania by Agnew, Ch. J., 85 Pa. 180, 27 American Reports 633.

penetrate his farm, lead to it. The water-works will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city, or a State, is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates if he has none himself.

"The officers whose duty it is to punish and prevent crime are paid out of the taxes. Has he no interest in maintaining them, because he lives further from the court house and police station than some others?

"Clearly, however, these are matters of detail within the discretion, and therefore the power, of the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due process of law."[1]

[1] See also Taggart *v.* Claypool, 145 Ind. 596, and 32 L. R. A. 586, following and applying Kelly *v.* Pittsburgh. The rulings in the State courts upon this difficult question of the power of the State legislatures in the absence of constitutional restriction to annex and subject farming lands to ordinary municipal taxation, are collated by Judge Dillon, 2 Mun. Corp., 4th Ed., Section 795. He says: "It must be admitted that in the absence of specific constitutional restrictions the difficulties in the way of pronouncing such legislation unconstitutional or of affording *judicial* relief in such cases are almost unsurmountable." See also cases collected in note to State ex rel. Richards *v.* Cincinnati (Ohio), 27 L. R. A. 737.

The Supreme Court of Missouri held in 1856 that the legislature could not authorize a municipal corporation to tax for its own local purposes lands lying beyond its corporate limits, Wells *v.* Weston, 22 Mo. 385.

§ 346. **What is public purpose for taxation?**

While the declaration of the legislature that a tax is laid for a public purpose must necessarily be given great weight, as taxation is essentially a legislative power, such declaration is not conclusive. It is the universal holding however that courts are justified in interposing only when it clearly appears that the supreme law governing both the legislature and the judiciary would be violated by the enforcement of the legislative purpose. In determining what is a public purpose, as was said in the Topeka case, the courts are governed mainly by the course and usages of the government, the objects for which taxes have been customarily and by long course of legislation levied, and what objects and purposes have been considered necessary for the support and proper use of the government, whether State or municipal. "Whatever lawfully pertains to this, and is sanctioned by time and acquiescence of the people may well be held to belong to the public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."[1]

In the language of the Supreme Court of Michigan,[2] the public purpose of taxation does not relate to the urgency of the public need, or to the extent of the public benefit, but the term is used to distinguish the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality.

The public purpose which will warrant the exercise of the taxing power is that which is sustained by the prevailing and controlling public opinion of the time; not the public opinion in the popular sense, which is conclusively reflected in the expression of the legislative will, but the

[1] Quoted by the Supreme Court of Missouri in State ex rel. *v.* Switzler, 143 Mo. 317.

[2] People *v.* Salem, 20 Mich. 452, l. c. p. 485.

trained and thoughtful judicial opinion. The public opinion of one age or generation however, as reflected in judicial opinions concerning the proper scope of governmental activity, or as to what are the public purposes of taxation, is not the public opinion of another age or of another generation. Upon these questions our juristic conceptions must tend to harmonize with the well-settled, all-powerful influences of public opinion in a popular sense. In the words of Mr. Lowell, "our written constitutions are an obstacle to the whim, but not to the will of the people."

The development of judicial opinion upon this subject may be illustrated by selections from a few of the more notable opinions of the many that have been announced in the courts.

§ 347. Conflicting judicial opinions as to public purpose necessary for taxation.

It was held in 1875, by the Supreme Court of Kansas, opinion by Judge Brewer, now of the United States Supreme Court,[1] that a statute of that State enacted after a crop failure, authorizing the issue of bonds to raise money for the purchase of seed corn to be given to the farmers, was invalid as authorizing taxation for a purpose which was not public. The provision of the State Constitution authorizing appropriations for the support of the poor was held to be limited to giving aid to paupers. The argument that the prevention of pauperism is a public purpose was dangerous and unsound, and the securing of loans to persons temporarily embarrassed is not a public purpose.

But the Supreme Court of North Dakota in 1890 held

[1] State *v.* Osawkee Township, 14 Kansas 418.

a similar statute was valid,[1] declining to follow the Kansas case and saying, l. c. p. 97: —

"In our view it is not certain or even probable, in the light of subsequent experience in the west, that the court of last resort in the State of Kansas would enunciate the doctrine of that case at the present day. The decision was made fifteen years ago. While the fundamental principles which underlie legislation and taxation have not changed in the interval, it is also true that the development of the western States has been attended with difficulties and adverse conditions which have made it necessary to broaden the application of fundamental principles to meet the new necessities of those States."

After reviewing the legislation of Minnesota on the same subject, the court continued, at page 99: —

"This review of legislation in aid of destitute farmers will serve to illustrate the well-known fact that legislation under the pressure of public sentiment, born of stern necessity, will adapt itself to new exigencies, even if in doing so a sanction is given to a broader application of elementary principles of government than has before been recognized and applied by the court in adjudicated cases. It is the boast of the common law that it is elastic, and can be adjusted to the development of new social and business conditions. Can a statute enacted for such broadly humane and charitable purposes be annulled by another branch of the government as an abuse of legislative discretion? We think otherwise."

The court lays stress upon the language of the State constitution permitting the legislature to lend aid "for the necessary support of the poor," and upon the fact that this peculiar language was introduced into the constitutions of North and South Dakota, although nothing of the kind

[1] North Dakota *v.* Nelson County, 1 N. Dak. 88.

appeared in analogous sections of other State constitutions. It found a reason for this in the peculiar and alarming conditions of the people of the Dakota Territory in 1889 when their constitutions were formed. The seed grain statute was therefore declared to be a valid enactment.

A decision by the Supreme Court of Missouri in 1898 enforces the limitation of the power of taxation with reference to the higher education. A tax levied under an act entitled "For the Endowment of the State University," the proceeds whereof were to be applied in defraying the expenses at the University of students without means, who should be awarded scholarships of merit through competitive examinations, was held to be invalid as levying a tax for private persons and not for a public purpose.[1] The constitution of Missouri directs the maintenance of the State University, and it was urged that, as scholarships are a recognized and historic incident of University endowment, this method of maintenance of the University and making it serviceable in the education of the talent of the State is within the discretion of the legislature, which cannot be reviewed by the judiciary. There is no difference in principle, it was contended, between building dormitories for students to live in and paying professors to teach them, as is done under existing law, and endowing scholarships so that deserving students without means can have the benefit of the instruction. But the court said that the act "endowed the students, not the University," and was therefore a paternalistic gift of public money to private individuals; and that it could find no warrant for this endowment of scholarships, either in the organic law of the State, or in the character of our government.

On the other hand, it has been held that the maintenance

[1] State ex rel. *v.* Switzler, 143 Mo. 287.

not only of public[1] and high schools,[2] but also of Normal schools,[3] is a public purpose for which the power of taxation may be invoked, but the contrary is true of mere private schools.[4] In the language of Judge Cooley[5] in the Supreme Court of Michigan: —

"Necessity alone is not the test by which the limits of the State's authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to continue the existence of organized government and embrace those which may tend to make that government subserve the general well-being of society and advance the present and prospective happiness and prosperity of the people."

§ 348. Erection of public sorghum mills not public purpose.

In a recent decision the United States Circuit Court of Appeals of the Eighth Circuit, in an exhaustive opinion by Judge Sanborn,[6] decided that bonds authorized by the legislature of Kansas, upon vote of the electors of the township, issued to pay a subscription to the capital stock of a corporation organized to erect public sorghum mills, were invalid, and that the tax required was not for a public purpose. In this case the act declared that all mills that received the aid were public mills and should manufacture sugar or syrup for customers. The court said that the limits of the power to tax are by no means the limits of the police power of the State, and added at page 668: —

[1] Commonwealth *v.* Hartman, 17 Pa. 118.

[2] Richards *v.* Raymond, 92 Ill. 612.

[3] Briggs *v.* Johnson County, 4 Dillon 148.

[4] Curtis *v.* Whipple, 24 Wisc. 350.

[5] People *v.* Salem, 20 Mich. 452.

[6] Dodge *v.* Mission Township, 46 C. C. A. 661, 54 L. R. A. 242, decided April, 1901.

"Many private occupations, as the sale of intoxicants, the driving of carriages for hire and the construction of private buildings along the streets of a city, bear such a relation to the public welfare that they may be regulated under the police power of a State, when there is an entire absence of power in its legislature to tax the property of its citizens to promote or maintain these enterprises."

The court in this case distinguished the decision of the Supreme Court in Burlington Township *v.* Beasley, *supra*, § 342, which held that the erection of custom grist mills was a public purpose, saying that the bonds in that case did not show on their face for which of the purposes named in the act they were issued. On the question whether a custom grist mill operated by steam is a work of internal improvement, the court declared that on this point the Burlington Township case illustrates, not the general rule, but an exception thereto, and said, l. c. p. 665: "This decision is the outgrowth of a more primitive state of society when there were no railroads and few good highways, and when custom grist mills in the immediate neighborhoods of productive fields to grind grain for bread for the people and for food for the cattle were a public necessity. In this state of affairs a line of decisions was developed to the effect that aid in the construction and maintenance of custom grist mills driven by water, and the development of the necessary water power to propel them, was a public object, for which taxes might be lawfully levied upon the property of all the citizens. Guernsey *v.* Burlington Township, 4 Dill. 375, Fed. Cas. No. 5,855; Harding *v.* Funk, 8 Kan. 315. The Burlington Tp. Case, perhaps, advanced another step, for the decison was that the promotion of a grist mill propelled by steam, as well as one propelled by water, was a public purpose. This proposition, however, together with the entire line of decisions upon which it rests, forms an exception to the general rule

upon this subject, is inapplicable to the public needs and purposes of this day, and ought not to be enlarged."[1]

After citing the later decisions of the Supreme Court noted above, the court said: "These decisions show the narrow limits and sharp lines which confine this exception to the general rule."[2]

§ 349. Inspiration of patriotism lawful public purpose.

Whatever legitimately tends to inspire patriotic sentiments, and to enhance the respect of citizens for the institutions of their country, and incites them to contribute to its defense in time of war, has been held to be a lawful public purpose, such as will justify the exercise either of the power of taxation or of the power of eminent domain.[3]

[1] The payment of a sugar bounty for the encouragement of the industry was held void, Michigan Sugar Co. *v.* Auditor General, 124 Mich. 674.

[2] The opinion in this case contains a valuable review of the decisions upon this subject. See Deal *v.* Mississippi County, 107 Mo. 464, and 14 L. R. A. 622, holding invalid a bounty for planting forest trees. As there was no right in the public to the trees or their use and control, the act was held void.

In Lowell *v.* Boston, 111 Mass. 454, an issue of bonds for $20,000,000 for the purpose of loaning money to the owners of land burned over in the great fire of 1872 conditioned upon their rebuilding within a year, the loans to be secured by mortgage, was enjoined as not for a public purpose.

Allen *v.* Jay, 60 Me. 124, held that the loan of credit for removing a steam saw mill, box factory and grist mill to the village was not for a public purpose. No distinction apparently was made between a saw mill and a grist mill, both being industries pursued for private gain and emolument.

In Weismer *v.* Douglas, 64 N. Y. 91, bonds issued for the purpose of paying a subscription to stock of a lumber factory, which, it was claimed, would increase the value of adjacent property and promote business by cleaning out the channel of the river and constructing piers, were held void. See also Martha *v.* Ottawa, 114 Ill. 59; Coates *v.* Campbell, 37 Minn. 498; Geneseo *v.* Geneseo Company, 55 Kans. 358.

[3] United States *v.* Gettysburg Electric R. Co., 160 U. S. 668.

On this ground and for the further reason that the public taste is educated thereby, the expenditure of public moneys for the promotion of State exhibits at World's Fairs has been sustained.[1]

A tax for raising money to pay bounties to soldiers in order to encourage enlistments in time of war is valid, but a tax for the payment of substitutes for individuals to enable them to escape conscription,[2] and for the payment of bounties to soldiers after the war, as a testimonial of the public appreciation of their services, were held to be without consideration and void.[3]

The public purpose however, to warrant the exercise of the power of taxation must be one which appeals to all the people and is not in any sense partisan. This distinction was forcibly illustrated in a recent Massachusetts case. An act of the legislature authorized the city of Brockton to erect a Memorial Hall to the memory of the soldiers and sailors of the Civil War. This was held to be a valid statute, because the education of the public taste and inspiring sentiments of patriotism in the public mind serve to promote the general welfare.[4] The city council however, under authority of the statute, passed an ordinance appropriating money for a Memorial Hall and Library building to be used in part by a G. A. R. Post. The court held with regard to this appropriation that it was not for a

[1] Daggett *v.* Colgan, 92 Cal. 53, and 14 L. R. A. 475, where the note contains an interesting collation of the State decisions on this subject. Justice Sanborn, in the United States Circuit Court of Appeals recently, July, 1902, in chambers at St. Paul, denied an injunction against condemnation proceedings for the World's Fair in St. Louis for the celebration of the Louisiana Purchase Centennial in 1904.

[2] Freeland *v.* Hastings, 10 Allen 570.

[3] See Booth *v.* Woodbury, 32 Conn. 118; Mead *v.* Acton, 139 Mass. 341. The conduct of an agricultural exhibition and the payment of premiums therein constitute a lawful purpose for taxation, State ex rel. *v.* Robinson, 35 Neb. 401, and 17 L. R. A. 383.

[4] Kingman *v.* Brockton, 153 Mass. 255, and 11 L. R. A. 123.

public purpose, and that there is no definition of a public purpose and use which includes the support and maintenance of a Grand Army Post, saying (11 L. R. A. l. c. 125): "If once the principle is adopted that a city or town may be authorized to raise money by taxation for conferring benefits on individuals merely because in the past they have rendered important and valuable services for the benefit of the general public, occasions will not be wanting which will appeal strongly to the popular sense of gratitude or to the popular emotion and the interests and just rights of minorities will be in danger of being disregarded."

§ 350. **Taxation for public ownership.**

The association of the legal view as to what constitutes a public purpose in taxation with the prevailing public opinion as to the scope of governmental activity was forcibly illustrated recently in Massachusetts, in the opinions of the Justices of the Supreme Court rendered to the House of Representatives of the legislature, under provision of the State constitution authorizing the justices to be thus interrogated as to the lawful powers of the legislature. The question was submitted, whether the legislature under the State constitution could authorize cities and towns to manufacture and distribute gas and electricity for use in their public streets and buildings and for sale to the inhabitants. The justices answered:[1] "If the legislature is of opinion that the common convenience and welfare of the inhabitants will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants, we think the legislature can confer the power."

But subsequently the House of Representatives submitted

[1] Opinion of Justices, 150 Mass. 592, 8 L. R. A. 487.

to the justices the further question whether power could be conferred by the legislature upon cities and towns to buy and sell coal and wood for fuel for their inhabitants. Five of the seven judges concurred in the answer, that such a power could not be lawfully conferred by the legislature, as it was not a public service within the meaning of the rule that taxes can be laid only for public purposes. The opinion quoted the preamble of the State constitution declaring that "the end of the institution, maintenance, and administration of government is to secure the existence of the body politic; to protect it, and furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life." "That all men are born free and equal, and have certain natural, essential, and inalienable rights, among which may be reckoned the rights of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." And the opinion continued (15 L. R. A., p. 810): —

"Constitutional questions concerning the power of taxation, necessarily are largely historical questions. The Constitution must be interpreted as any other instrument, with reference to the circumstances under which it was framed and adopted. It is not necessary to show that the men who framed it or adopted it had in mind everything which by construction may be found in it, but some regard must be had to the modes of thought and action on political subjects then prevailing; to the discussions upon the nature of the government to be established; to the meaning of the language used, as then understood; and to the grounds on which the adoption or rejection of the Constitution was advocated before the people. We know of nothing in the history of the adoption of the Constitution that gives any countenance to the theory that the buying and selling

of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established."

The court said that there was nowhere in the Constitution any provision which tended to show that the government was established for the purpose of carrying on the buying and selling of such merchandise, as, at the time when the Constitution was adopted, was usually bought and sold by individuals and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. After reviewing the precedents in the State from colonial times, the opinion concluded, at page 812: —

"If there be any advantage to the inhabitants in buying and selling coal and wood for fuel at the risk of the community on a large scale, and on what has been called the 'co-operative plan,' we are of the opinion that the Constitution does not contemplate this as one of the ends for which the government was established, or as a public service for which cities and towns may be authorized to tax their inhabitants. We therefore answer the question in the negative." [1]

§ 351. Public purpose in eminent domain.

The public purpose necessary in the condemnation of private property is analogous to that required in taxation.

[1] Opinion of the Justices, 155 Mass. 598, and 15 L. R. A. 809. In this case Judge Holmes, now of the Supreme Court of the United States, dissented, saying: "I am of opinion that when money is taken to enable a public body to offer to the public without discrimination an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water or gas or electricity or education, to say nothing of cases like the support of paupers or the taking of land for railroads or public markets. I see no ground for denying the power of the legislature to enact the laws mentioned in the questions proposed. The need or expediency of such legislation is not for us to consider."

Judge Barker answered: "My answer to the question propounded is

In both cases the legislative determination will be respected by the court but will not be conclusive. A distinction however has been made by high authority[1] between the public purpose in condemnation and that in taxation, to the effect that a more liberal construction of public purposes is allowed in the former than in the latter.[2]

This distinction was thus summarized by the Supreme Court of Massachusetts in the opinion of the Justices upon the power of the legislature to manufacture gas and electricity (8 L. R. A. l. c. p. 488): —

"The extent of the right of taxation is not necessarily to be measured by that of the right of eminent domain, but the rights are analogous. Private property can be taken without the consent of the owner only for public uses, and the owner must be paid full compensation therefor; otherwise he would contribute more than his proportionate share toward the public expenses. By taxation the inhabitants are compelled to part with their property, but the taxation must be proportional and reasonable, and for public purposes. Taxes may be imposed upon all the inhabitants of the State for general public purposes, or upon the inhabitants of defined localities for local purposes, and when distinct private benefits are received from public works special assessments may be laid upon individuals."

It was held by the Supreme Court[3] that the United States had authority under the Fifth Amendment to condemn land for the purpose of preserving and suitably marking the battlefield of Gettysburg, and that any act which may indirectly tend to enhance the respect of the

therefore, 'Yes, if the necessities of society as now organized can be met only by the adoption of such measures,' and 'No if there is no such necessity, but merely an expediency for the trial of an experiment.'"

[1] People *v.* Township Board of Salem, 20 Mich. 452.

[2] Cooley on Taxation, p. 76.

[3] United States *v.* Gettysburg Electric Ry. Co., 160 U. S. 668.

local citizens for the institutions of their country and quicken and strengthen their motives to defend them constitutes a legitimate public purpose.

But an act of the State of Nebraska, which, as construed by the Supreme Court of the State, authorized the Board of Transportation to require a railroad company, which had permitted the erection of two elevators by private persons on its right of way at a station, to grant the same privilege upon similar conditions to other private persons in that neighborhood, authorized a taking of private property for private use in violation of the Fourteenth Amendment.[1]

§ 352. Any proceeding dependent upon taxes for private purposes invalid.

The cases cited in which the Supreme Court passed upon the want of public purpose in taxation were suits upon municipal bonds which were held to involve the exercise of the power of taxation, and because the purpose of the tax was illegal, the bonds dependent thereon were also invalid. This principle has been extended to the case of a contract made by a village with a manufacturing company, whereby the former agreed to pay the latter for the expense of removal to the village, and further agreed that, in consideration of the removal, it would establish and maintain a fire hydrant and furnish water for fire protection. The village paid the cash bonus but failed to maintain the hydrant. The mill was destroyed by fire and suit was brought for its value by the owner against the village, on the ground that the fire could have been extinguished if the hydrant had been maintained. It was held by the United States Circuit Court of Appeals, Sixth Cir-

[1] Missouri Pacific Railway Co. *v.* Nebraska, 164 U. S. 403.

cuit,[1] that if the municipal corporation under the doctrine of Loan Association *v.* Topeka was without power to issue bonds for other than a strictly public purpose, it was equally without power to accomplish the same result indirectly by the execution of a contract, for a judgment upon this could be rendered against the corporation which could be satisfied only by taxation. The court said, at page 312: "The only difference which could be suggested relates merely to form and to the differences between a direct and indirect method of incurring an obligation which does or may require a resort to the power of taxation."

§ 353. **Railroad aid bonds.**

It has been uniformly affirmed by the Supreme Court that, in the absence of restrictions in the State constitution, subscriptions for aid in the building of railways, canals and bridges constitute a public purpose for which bonds, to be paid by taxation, can be issued. Thus that tribunal said,[2] referring to a railroad: "Though the corporation was private, its work was public, as much so as if it were to be constructed by the State. Private property can be taken for a public purpose only, and not for private gain or benefit. Upon no other ground than that the purpose is public can the exercise of the power of eminent domain in behalf of such corporations be supported. * * * Unless prohibited from doing so, the municipal corporation has the same power to aid in their construction as to procure water for its water works, coal for its gas works, or gravel for its streets from beyond its territorial limits."[3]

[1] Southerland-Innes Co. *v.* Village of Evart, 30 C. C. A. 305.

[2] Township of Pine Grove *v.* Talcott, 19 Wall. 666, l. c. 676; Sharpless *v.* Mayor, 21 Pa. St. 147. In Whiting *v.* Fondulac Railroad, 25 Wis. 167, it was held that a tax for making a donation to a railroad, in which the county did not become a stockholder, was void.

[3] See also Meyer *v.* Muscatine, 1 Wall. 384, and see dissenting opinion of Mr. Justice Miller, who consistently denied this doctrine.

§ 354. Purpose of taxation must not only be public, but pertain to district taxed.

The requirement of a public purpose obviously applies to all forms of taxation, whether levied by the State or any of the subdivisions of the State to which the power of taxation may be delegated, and whether the tax is general in the State or municipality, or special, that is, levied by way of special assessment in limited taxing districts created for public improvements. Whatever the form of the tax, it is inherent in its nature that it must be levied for a public, as distinct from a private, purpose; and it also must be public in the sense that the purpose must pertain to the district taxed, that is, the tax levied upon the entire State must be for a general public purpose as distinguished from a distinctively local or municipal purpose. On the other hand, a tax cannot, or rather should not, be levied upon a particular district of a State alone for a general public purpose not peculiar to the district taxed.[1] This line of distinction however is not sharply defined, but there is obviously a very large field of legislative discretion in determining what are the public purposes which warrant general taxation on the one hand, and, on the other, those which justify the legislature in imposing taxation upon the municipal subdivisions of the State. As the Supreme Court has repeatedly declared, this is one of the questions which cannot be adjusted with precise accuracy, and it is primarily addressed to the legislative discretion.

Judge Dillon remarks in 1 Dillon on Municipal Corporations, 4th Ed., note, section 509: "If it be allowable to judge of a legal principle by its fruits, the dissenting and minority of judges on this question will find much to confirm the conviction that their views were sound. But it is useless to fight that battle over again; it has been fought and lost. All that is left is the contemplation and contrast of what might have been and what is."

[1] Sanborn *v.* Rice Co., 9 Minn. 273.

This principle is applicable in the creation of local taxing districts for public improvements, which will be considered in the succeeding chapter. Questions relating to the public purpose of taxation can seldom be raised in regard to general levies for State purposes, as such taxes are assessed and collected under general laws, wherein the specific objects for which taxes are to be expended are not set forth, as in the case of taxes levied for specific local purposes; and the courts cannot look behind the declared purposes of a general tax to ascertain the intent of the legislature as to the appropriation of the proceeds of the tax.

CHAPTER XIII.

DUE PROCESS OF LAW IN SPECIAL ASSESSMENTS FOR LOCAL IMPROVEMENTS.

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§ 387. Supreme Court in King *v.* Portland.
388. Legislative power and special facts.
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390. Requirements of "due process of law."

§ 355. Special assessments made under taxing power.

Special assessments for local improvements are made under the sovereign power of taxation,[1] yet they are clearly distinguished from regular tax levies made under State authority for general public purposes. Taxes proper, or general taxes, it was said by the Supreme Court,[2] proceed upon the theory that the cost of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no special benefit, but only secures to the citizen that general benefit, which results from the protection of his person and property and

[1] It was contended at one time that such assessments could only be made in the exercise of the right of eminent domain. For an interesting discussion of this point, see People ex rel. Griffin *v.* Brooklyn, 4 N. Y. 419, which is a leading case on the doctrine that such assessments are an exercise of the power of taxation, and which distinguishes the power of taxation from the power of eminent domain. See also Newby *v.* Platte Co., 25 Mo. l. c. 269. In certain cases such assessments have been sustained as an exercise of the police power of the State, as in the case of drains and sewers, Paulsen *v.* Portland, 149 U. S. 30; Morrison *v.* Morey, 146 Mo. 543, where the creation of levee districts was sustained on that ground. Special assessments for sidewalks have also been sustained as an exercise of the police power, Palmer *v.* Way, 6 Colo. 106; State *v.* Newark, 8 Vroom (N. J.), 415; Washington *v.* Nashville, 1 Swan (Tenn.), 177. See also McBean *v.* Chandler, 9 Heisk. 349. A distinction was thus made in some cases between sewers and sidewalks and other improvements. But it was said by Redfield, J., in Allen *v.* Drew, 44 Vt. 174, that it is not easy to see any distinction between an assessment for the building of a sewer or sidewalk and an aqueduct, and that each in degree is a general benefit to the public and a special benefit to the local property both in the uses and the enhanced value of the property.

[2] Illinois Central R. R Co. *v.* Decatur, 147 U. S. 190, l. c. 197.

the promotion of those various schemes which have for their object the welfare of all. On the other hand, special assessments or special taxes are justified by the principle that when a local improvement enhances the value of neighboring property, that property should pay the expense. Special assessments are made upon the assumption that a portion of the community will be specially and peculiarly benefited by the enhancement of the value of property peculiarly situated as regards the contemplated expenditure of public funds; and, in addition to the general levy, special contributions in consideration of the special benefit are required from the party specially benefited.

It was said in an early case in Missouri:[1] "These special assessments are found in the English law and have prevailed, it is believed, in most, if not all, of our American States, and their validity, when assessed, as in this instance (for a sewer tax), cannot be questioned under our constitution. Their intrinsic justice strikes every one. If an improvement is to be made the benefit of which is local, it is but just that the property benefited should bear the burden. While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the benefit of the few. A single township in a county ought not to bear the whole county expenses, neither ought the whole county be taxed for the benefit of a single township. And the same principle requires that taxation for a local object, beneficial only to a portion of a town or city, should be upon that part only. General taxation for a mere local purpose is unjust. It burdens those who are not benefited and benefits those who are exempt from the burden."

Special assessments are clearly distinguished from general taxes. Thus contracts of exemption from taxation

[1] Lockwood *v.* St. Louis, 24 Mo. 22.

have been held not to exempt the property from assessments for public improvements,[1] and it is a question in the construction of private contracts, like leases, whether the term taxation therein includes special assessments.[2]

§ 356. Peculiar difficulties in special assessments.

The exercise of the taxing power of the State to pay the cost of a puplic improvement by assessment upon the property specially benefited involves peculiar difficulties which do not attend the levy of general taxes. For the latter, there is no need to create a special taxing district and define its boundaries, nor is there any question as to the determination of what property is specially benefited by the expenditure of the taxes when collected. All this is regulated by general law. Neither is there any question, as a rule, as to the notice and opportunity to the taxpayer for hearing in relation to the assessment. Property is assessed for general taxation under general law, and the taxpayer is bound to take notice of the time and place fixed for hearing by the board of review or equalization to which he may appeal for correction of his assessment. Furthermore general taxes are assessed and collected at regularly recurring intervals fixed by law; and the proceeds of general taxes, when collected by the State or political subdivision acting under

[1] *Supra*, § 96.

[2] It was said in a recent opinion by the Supreme Court of Missouri, sustaining a special assessment for the establishment of a public park, Kansas City *v.* Bacon, 157 Mo. 450, l. c. 463: "There are two kinds of taxation, both emanating from the taxing power of the government, but each resting on a different principle, the one aimed to raise a revenue for general governmental purposes, the other to raise a fund to be devoted to a particular purpose. The one for its justification leaves out of view the question of individual benefit, merging the individual in the community, the other for its justification advances the theory that the individual is benefited by the improvement contemplated, and because of his benefit he must contribute to the cost."

State authority, for prescribed public purposes, are disposed of by the legislative authority within the limits of its power. Comparatively seldom therefore have questions arisen concerning due process of law in relation to general taxation, and these have usually been in relation to special methods of assessment applied to certain classes of property, as in the valuation of railroads or other interstate properties.

But special assessments for local improvements from their very nature involve peculiar and difficult questions, which have occasioned much ligitation and much diverse judicial opinion. Thus what are the limits, if any, of the power of the State to determine that any public improvement shall be paid for by local taxation, rather than out of the public revenues, to determine the boundaries of the taxing district whereon the cost of that improvement shall be levied, and to determine the method of apportionment upon the property in the district, whether by ascertainment of values through *quasi* judicial bearing, or by some definite rule, as by area or by frontage? When must notice and opportunity for hearing be afforded to the taxpayer to constitute due process of law?

§ 357. Fifth and Fourteenth Amendments in relation to special assessments.

The subject of due process of law in connection with special assessments for local improvements has been considered by the Supreme Court of the United States in numerous cases, in relation to both the Fifth and the Fourteenth Amendments to the Constitution. The provision of the Fifth Amendment that no person shall be deprived of life, liberty, or property without due process of law, as heretofore shown, is only a restraint upon the power of Congress and not upon the power of the States; while the Fourteenth Amendment imposes the same prohibition directly

upon the States. In cases from the States, the Supreme Court has considered the question with relation to the Fourteenth Amendment, while in cases from the city of Washington or elsewhere in the District of Columbia where Congress exercises exclusive jurisdiction, both political and municipal, it has applied the Fifth. In a recent case[1] the court said: "While the language of those amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper."

The court however further stated in this case that it proceeded therein upon the assumption that the legal import of the phrase due process of law is the same in both amendments and added, l. c. page 329: "Certainly it cannot be supposed that, by the Fourteenth Amendment, it was intended to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal government in a similar exercise of power by the Fifth Amendment." In none of the cases has the Supreme Court made any distinction between the two amendments as to the two requirements of "due process of law" in special assessments.

§ 358. General power of State in local assessments.

Although special assessments are usually made for public improvements in municipalities and form one of the most perplexing problems in municipal government, their use is not limited to municipalities. Public improvements, which may be of special benefit to property in a certain locality, may be required in any part of the State, and the application be thus warranted of the principle on which

[1] French v. Barber Asphalt Paving Co., 181 U. S. 324, l. c. 328.

special assessments rest, that the property benefited by the improvement should pay the cost. The State therefore has the general power not only to determine that public improvements shall be made, whenever it deems them essential to the health and prosperity of the community, but also to determine to what extent the cost of such public improvements shall be paid by the public at large and what part shall be paid by the property specially benefited thereby. It follows that the State has the power, subject to the restraints of its own constitution, to establish local taxing districts in any part of its territory and to impose upon such districts the cost of a public improvement. Upon the same principle it may impose the expense of a public improvement upon a municipality, which is specially benefited thereby, although benefit from the improvement may also inure to the people of the State at large. Thus it was said by the Supreme Court,[1] in reference to the act of the State of Alabama, which imposed upon the city of Mobile the expense of a harbor improvement in Mobile Bay: —

"When any public work is authorized it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.

"It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement,

[1] Mobile *v.* Kimball, 102 U. S. 691, l. c. 703.

which was to benefit the whole State, among all its counties. But this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive State legislation. The judicial power of the Federal government can only be invoked when some right under the Constitution, laws, or treaties of the United States is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."[1]

§ 359. Power of State to impose taxation upon municipalities.

The power of the State to create taxing districts is closely allied with its sovereign power over its political subdivisions and municipalities, the limits of which it is obviously very difficult to determine. The question of the State's power over its municipalities was presented in another form to the Supreme Court, in a case in-

[1] It was said by the Supreme Court of Missouri in State *v.* Leffingwell, 54 Mo. 458, l. c. 473, holding void an act making a park district out of part of a city, that nothing is better settled than that special taxation for objects that are general and public is illegal. * * * "The legislature has no power to take the money of one man and transfer it to another, nor can it select a particular township and say that it shall pay all the taxes of the county, nor designate a certain county and declare it shall assume all the burdens of the State." The act was held void on the ground that the property in the district was not any more benefited by the park than the property in the city at large, and the case was decided irrespective of the provision of the State constitution as to organizing public corporations. In Dyar *v.* Farmington Village, 70 Me. 515, an act authorizing a town to levy a general tax upon part of the real estate included within its limits was held void, the court saying that one public district could not be created within another nor be

volving the validity of a statute annexing to a city what was claimed to be rural territory, and imposing upon the latter's inhabitants arbitrarily the burden of taxation for city purposes, in return for which it was claimed they derived no benefit.[1] The court held that what portion of the State should be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city should be settled is one of the matters within the legislative discretion. Whether territory shall be governed for local purposes by a county, a city, or a township organization is one of the most usual and ordinary subjects of State legislation, and the court refused to interfere with the exercise of the legislative discretion on this subject.

This principle of the State's control over its municipalities was reaffirmed by the court in sustaining the legislation of Connecticut, whereby a bridge district was made of five municipalities, upon which was apportioned the cost of the

allowed to overlap another, so that for the same public purpose or any other public purpose one portion of the real estate is taxed twice while the remainder is taxed only once.

[1] Kelly *v.* Pittsburgh, 104 U. S. 78, *supra*, § 318. See also Forsythe *v.* Hammond, 68 Fed. Rep. 774. It has been held in Missouri that the legislature cannot constitutionally authorize a municipal corporation to tax for its own purposes lands lying beyond its limits, Wells *v.* Weston, 22 Mo. 384. It would seem, under the same principle, that the legislature could not impose upon a municipality a tax for purely State purposes having no relation to the municipality. Judge Dillon says in Municipal Corporations, 4th Ed., § 73, as to the distinction between the public and proprietary rights of a municipality, after reviewing the authorities, that there are difficulties attending the usually unlimited power over municipal corporations, and difficulties also in assigning limits to that power. He concludes: "On the whole the question whether a city may be compelled to create a debt or liability against its will must be answered, we think, with reference not only to the constitutional provisions of the State, but to the nature of the purposes for which the debt or liability is to be incurred."

purchase and maintenance of a free bridge in the proportion of benefits received by each, as determined by judicial proceedings.[1] The regulation of municipal corporations is a matter peculiarly within the domain of State control, and a municipal corporation, so far as its purely municipal relations are concerned, is simply an agency of the State for conducting the affairs of the government, and as such subject to the control of the legislature. These are matters of a purely local nature, in respect to which the Federal Constitution does not limit the power of the State. It was also said that the legislature, speaking generally, may create a new taxing district, if the State's constitution does not prevent, and determine what territory shall belong to such district and what property shall be considered as benefited by the proposed improvement.

The power of the State to impose upon municipalities or local taxing districts the cost of public improvements is primarily a legislative power. As this power in the distribution of public burdens is of the very essence of sovereignty, it is very difficult to declare its limitations, and especially is this true when the Federal Supreme Court is called upon to review the judgment of the State courts upon the validity of State legislation. Nevertheless it is clear that the fundamental canons of taxation, that the purpose must be public and that the public purpose must directly appertain to the district taxed, apply to special assessments as fully as to general taxation. The legislative power is not absolute and unlimited in the one case any more than in the other. The legislative discretion therefore in apportioning the cost of public improvements, while broad and comprehensive, is not unlimited,

[1] Williams *v.* Eggleston, 170 U. S. 304, affirming State *v.* Williams, 68 Conn. 131. As to the power of the State over municipalities, see also New Orleans *v.* New Orleans Water Co., 142 U. S. 79.

but is subject to judicial review and scrutiny in determining whether property charged with such cost is taxed in accord with the fundamental canons of taxation and thus under "due process of law."

§ 360. **Power of State limited by its jurisdiction.**

The State must exercise this power within the limits of its jurisdiction and cannot therefore, in assessing the cost of a public improvement upon the property in a certain district, authorize the recovery of a personal judgment against a non-resident, without service of process. Thus the statute of Iowa authorized a personal judgment in a suit upon a special tax bill for a local assessment. It was held by the Supreme Court[1] that such a judgment rendered without personal service against a non-resident, so far as the personal liability is concerned, would amount to the taking of property without due process of law; and that such a judgment is good only so far as it affects the property which is taken or brought under the jurisdiction of the court or other tribunal in an ordinary action to enforce the personal liability. No jurisdiction is thereby acquired over the person of a non-resident, further than respects the property so taken, and this is as true of an assessment against a non-resident as of a more formal judgment. In this case the landowner never voluntarily appeared in the litigation.

But it seems that the authorization of a personal judgment on a special assessment, to be recovered upon personal service, is within the power of a State and presents no Federal question.[2] As to this point the court said, l. c. page 106: —

"It is urged with force, — and some highly respectable

[1] Dewey *v.* Des Moines, 173 U. S. 195.

[2] Davidson *v.* New Orleans, 96 U. S. 97.

authorities are cited to support the proposition, — that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or, perhaps, in a Circuit Court of the United States,[1] we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase 'due process of law,' and none other is called to our attention in the present case."

§ 361. **Assessments for drainage.**

The extent of the State's power to create special taxing districts for public improvements is illustrated in the drainage or swamp land cases, wherein the laws of Louisiana, New Jersey and California, providing for the drainage of swamp lands by the levy of local assessments, were all sustained by the Supreme Court.[2]

In the first of these cases it was claimed that the prop-

[1] This was a writ of error to the Supreme Court of Louisiana. Though it may be within the power of the State to create and enforce a personal liability in such cases, it is difficult to see how it can be defended. Special assessments rest upon the theory that the property is benefited sufficiently to pay the tax, and it seems inconsistent therewith that there should be any liability beyond the value of the benefited property. See Taylor *v.* Palmer, 31 Cal. 240, where the decision seems to have turned upon the construction of the State constitution. In Neenan *v.* Smith, 50 Mo. 525, the court based its decision denying the right to a personal judgment on its construction of the statute, but said that it greatly doubted whether a legislature has the power to authorize a general charge upon the owner of local property that may be assessed for its special benefit, unless the owners of all taxable property within the municipality are equally charged.

[2] Davidson *v.* New Orleans, 96 U. S. 97; Hagar *v.* Reclamation District, 111 U. S. 701; Wurts *v.* Hoagland, 114 U. S. 606.

erty of the plaintiff was not benefited by the improvement. The court said that this was a matter of detail on which it could not interfere, if it was clearly true; but that it was hard to fix a limit within the two parishes which constituted the taxing district, where the property would not be benefited by the removal of the swamps and marshes situated in those parishes.

In the second case in California, a system was formed for reclaiming swamp and overflowed lands and fitting them for cultivation through reclamation districts, established by the supervisors of a county upon petition of one-half or more of the holders of the lands. Commissioners were appointed to view the land and assess upon each acre to be reclaimed a tax, which should be its proportion of the whole expense. The Supreme Court sustained the judgment of the Circuit Court enforcing the collection of these taxes, saying, page 704: —

"It is not open to doubt that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundations, as well as for the opening of streets in cities and of roads in the country.

"It may possibly be that in some portions of the country there are overflowed lands of so large an extent that the expense of their reclamation should properly be borne by the State. But this is a matter purely of legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. County of Mobile *v.* Kimball, 102 U. S. 691, 704. The rule of equality and

uniformity, prescribed in cases of taxation for State and county purposes, does not require that all property, or all persons in a county or district, shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent. As we said in Louisiana *v.* Pilsbury, 105 U. S. 278, 295, there would often be manifest injustice in subjecting the whole property of a city, and the same may be said of the whole property of any district, to taxation for an improvement of a local character. The rule, that he who reaps the benefit should bear the burden, must in such cases be applied."

In the third case the New Jersey act provided for a system of drainage of all wet or marshy lands, upon proceedings instituted by at least five owners of separate lots of land in the tract and not objected to by the owners of a greater part thereof. The commissioners appointed by the Supreme Court of the State, after notice and hearing, made an assessment of the cost of the drainage upon all of the owners in the district. The Supreme Court after remarking that such drainage assessments had been sustained by the courts of New Jersey, held that, as the statute was applicable to all lands of the same kind and no person could be assessed under it for the expense of the drainage without notice and opportunity to be heard, there was no deprivation of property without due process of law.

§ 362. Assessments for irrigation.

A very important extension of this principle was made by the court in sustaining the Irrigation Acts of California[1] of 1887 and as amended by the act of 1891. This statute provided for the formation of irrigation districts upon the petition of fifty or a majority of the owners of land suscep-

[1] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112.

tible of one mode of irrigation from a common source and by the same system of work. On hearing, as to whether petitioners were of this class, whether they had complied with the statutory requirements and whether their lands would be benefited by the proposed improvement, the board of supervisors might modify the boundaries of the district so as to include other lands susceptible of the same improvement, that is, by irrigation from the same source, and to exclude lands which would not be thus improved. On approval by a two-thirds vote at an election in the district held under the direction of the Board of Supervisors, the irrigation district should be organized as a public corporation with fixed boundaries and the cost of the irrigation works assessed *ad valorem* upon all the lands within the corporate limits. In a suit brought in the United States Circuit Court by an alien property owner in the district, the enforcement of this statute by giving a deed of plaintiff's land sold for the non-payment of the assesment was enjoined on the ground that the statute was void as taking property without due process of law.[1] It was strongly urged on appeal that this act was distinguished from the drainage cases, in that there only the land drained was assessed for the improvement, but that in this case a man's land could be included, even if he did not want the water, did not need it and would not be benefited by it. It was also claimed that it was a delegation of the power of taxation to irresponsible petitioners and to a majority of the electors of the district.[2]

[1] For opinion in the Circuit Court, see 68 Fed. Rep. 948. This act had been sustained by the Supreme Court of California, Modesto Irrigation District *v.* Tragea, 88 Cal. 334. See also In re Madera Irrigation District, 14 L. R. A. 755, 92 Cal. 296. For an opinion of the Sup. Court of Nebraska holding the Irrigation Act of that State valid under State and Federal Constitutions, see Board of Directors *v.* Collins, 46 Neb. 411.

[2] See argument of Mr. Joseph H. Choate in this case, pp. 131 to 151. He said at page 142: "Patronage, plunder and bonds without limit are the

The Supreme Court, reversing the Circuit Court, held[1] that the act was valid and enforceable. The irrigation of really arid lands is a public use, and the question whether any particular land will be benefited is one of fact, for the determination of which the act made sufficient provision.

The court said, l. c. 166, that the question to what extent the land required irrigation was primarily legislative, though "subject to the scrutiny and judgment of the courts to the

obvious tendency and result, if not the direct object, of the act. Towns and villages, however solidly built, may be included, and practically are included in the districts proposed. * * * We submit, with all confidence, that this novel mode of constituting districts for assessment is an unlawful delegation of legislative power, and is in its very nature one of those exercises of the powers of government, unrestrained by the established principles of private rights and of distributive justice, which this court has declared to be the thing which constitutes the taking of a man's property without due process of law." In this case, Mr. Maxwell appeared with Mr. Choate, while against them were ex-President Harrison, ex-Judge John F. Dillon, Mr. William B. Guthrie, and Mr. Clarence A. Seward.

[1] Chief Justice Fuller and Justice Field dissented. The magnitude of the interest involved in this litigation may be realized from the following portion of the statement, p. 152: —

"What is termed the 'arid' belt is said in the Census Bulletin, No. 23, for the census of 1890, to extend from Colorado to the Pacific Ocean, and to include over 600,000,000 acres of land. Of this enormous total, artificial irrigation has thus far been used only upon about three and a half million acres, of which slightly over a million acres lie in the State of California. It was stated by counsel that something over thirty irrigation districts had been organized in California under the act in question, and that a total bonded indebtedness of more than $16,000,000 had been authorized by the various districts under the provisions of the act, and that more than $8,000,000 of the bonds had been sold and the money used for the acquisition of property and water rights and for the construction of works necessary for the irrigation of the lands contained in the various districts."

The Act of Congress of June 17, 1902, appropriates the receipts from the sale and disposal of public lands in certain western States and Territories, to be set aside as a "reclamation fund" for the construction of irrigation works to reclaim arid lands, in the area between Kansas, Nebraska and the Dakotas and the Pacific Ocean.

extent that it must appear that the use intended is a public use as that expression has been defined relatively to this kind of legislation." The act sufficiently limited the land which could be included in a district. It must be susceptible of irrigation from a common source, and by the same system of works, and it must be of such a character that it would be benefited by irrigation by the system to be adopted. This meant that the benefit must be substantial and the question whether any particular land would be substantially benefited was necessarily one of fact, upon which the court could not review the decision of the State court.

In answer to the claim that apportionment of the expense upon an *ad valorem* basis was wholly arbitrary and without any regard to the actual benefits received, some lands being, without irrigation, wholly arid, and some needing very little irrigation, if any at all, the court said, pp. 176–7:—

"Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment, as being in violation of the State constitution, yet as the State court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the Federal Constitution is shown in such an assessment. * * * Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be

used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the State legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law." [1]

§ 363. Public improvements in municipalities.

The difficulty of the questions growing out of the essential difference between special assessments and general taxation is increased by the circumstances attending the demand for public improvements in the rapidly growing cities of the country. Costly public improvements, such as sewers and paved streets, are, in the nature of things, only possible where there are compact populations and high real

[1] It was held by the New York Court of Appeals, In re Tuthill, 163 N. Y. 133, 49 L. R. A. 781, that the provision of the New York constitution authorizing the drainage of agricultural lands by necessary ditches and dykes upon the lands of others, under proper restrictions and making just compensation, did not authorize the assessment of the expense of constructing a drain upon other land-owners deemed benefited thereby, as the constitution contemplated that the expense should be borne by the petitioners. But it was said that, if the constitution did authorize such an assessment, it would involve the taking of property without due process of law, in violation of the Federal Constitution, as it would be levying a tax for a private purpose.

estate values. In the actual or anticipated growth of cities, very often these improvements are forced upon localities where the property is not of sufficient value to pay for them, and the enforcement of special assessments involves practical confiscation.

The expansion of city populations over large areas through the application of electricity to rapid transit has increased these difficulties, as the diffusion of population, while promoting the health and comfort of the people, sometimes diminishes rental values in other sections and makes special assessments for street improvements a greater burden upon property. This same cause has enormously enhanced the expense of municipal government, and has rendered more difficult of determination the proportion of expense of public improvements, which should be paid by the property-owners of the community at large. What might be fair and just in a compact community in a comparatively small space, may be very unfair and unjust in a sparsely populated area. There the same social and economic conditions which have increased the expense of municipal administration and which require that public improvements, if they are made at all, must be paid for by means of special assessments, make the property less able to carry the burden of such assessments.

Public improvements in municipalities are usually under the control of the municipal authorities, to whom the authority is delegated by the State to make such improvements at the cost of the property in the special taxing district created by the municipality therefor. Very often such improvements are made upon the demand of those who are not compelled to pay for them, and the discontent thus caused is not infrequently aggravated by a want of confidence in the municipal authorities. With the best possible municipal administration it requires careful consideration to determine what and when public improvements are required,

and when property in a district is sufficiently benefited to justify the assessment of the necessary cost. It is inevitable therefore that under existing conditions the imposition of special assessments should encounter the most vigorous resistence.

§ 364. Difficulty of determining special benefits.

While the principle involved in the establishment of a taxing district in a city is the same as in the case of a drainage or irrigation district in the country, the application often raises different and difficult questions. Thus while in the case of a sewer the territory drained may be a natural benefited district, what rule can determine with any degree of accuracy what part of the benefits from a street improvement inures to the property fronting the street, what part to the property on intersecting streets, and what part to the general public using the street? It not infrequently happens that the cost of a paved street is wholly out of proportion to the value of the abutting property, and the improvement is demanded solely for the convenience of the public. Thus in the case of a park which is open to the general public, what rule can determine the limits of the district upon which the cost of opening the park shall be charged? It is obvious that the determination of the proportional benefits enjoyed by contiguous property on the one hand and by the general public on the other, or the apportionment of the benefit as between the property owners in the district, cannot be determined with precision and can at best be but approximate.

It is agreed that the only basis for the apportionment is the presumption of special benefit to the property to the extent of the tax assessed. As the exercise of the taxing power is legislative and not judicial, the determination of the necessity for the improvement and the basis of the apportionment is primarily legislative. The most serious

legal difficulty, and the one upon which the courts have most widely differed, is as to the conclusiveness of the legislative determination in fixing the basis of apportionment, when this basis excludes the investigation of special benefits as to the individual property holders.

§ 365. Apportionment of cost of municipal public improvements.[1]

Different methods have been adopted for apportioning the cost of public improvements in municipalities. Thus when the taxing district is created, the proportion of benefits may be determined by a commission or other *quasi* judicial authority, or, as is more usual, a definite basis of apportionment may be established by the charter or ordinance of the municipality, according to the assessed value of the property in the district, or according to the frontage upon the street or other improvement, or upon the area within a designated district. Such legislative basis of apportionment, whether by assessed value or frontage or area is made upon the presumption that the special benefits are equally distributed through the district and are fairly apportioned on such basis.

Sometimes this apportionment by frontage or area is made the fixed rule of the city charter or statute, so that no discretion is left to the municipal authorities except in determining when the improvement shall be made, that is, when the conclusion is warranted that the special benefits to the property within the district will equal that part of the cost of the improvement to be taxed against such property. This method of fixing the basis of apportionment has the advantage of leaving as little as possible to the discretion of the municipal authorities. It also involves the disadvantage that the improvement, if made at

[1] See Walston *v.* Nevin, 128 U. S. 578, *infra*, § 373.

all, must be made upon the basis prescribed by the charter, and there can be no modification to meet special and exceptional circumstances which may make the application of this basis inequitable in individual cases. Although the special benefit is the only admissible warrant for the assessment, the consideration of the question is liable, under this system, to be obscured by the general public convenience demanding the improvement.

Sometimes a fixed proportion of the cost of the work is required to be paid from the general fund of the city, and only a part levied upon the property specially benefited; while in other cases the entire cost is assessed as special benefits upon property within the district. In sewer construction both the area and frontage rules have been applied. In street improvement the frontage rule is generally used, sometimes in connection with the area rule so as to include property upon intersecting streets, presumably benefited by the improvement.

§ 366. Special assessments under State constitutions.

It is not within the scope of this work to consider the questions arising in the different States, as to the construction of their own constitutions upon the power of the legislature to make assessments for local improvements. It is sufficient to state that the rule has been settled in nearly all the States, that special assessments for public improvements upon property specially benefited do not violate the constitutional requirement of uniformity and equality in taxation, or that property shall be assessed according to its value. Such provisions have been held to have no application to assessments based upon special benefits.[1]

In several States the earlier decisions to the contrary

[1] See 2 Dillon's Municipal Corporations, Sec. 752, where the State authorities are reviewed.

were subsequently overruled.[1] It was said by the Supreme Court [2] that it fully agreed with the Supreme Court of Louisiana in its construction of the constitution of that State requiring equality and uniformity in taxation, that it did not take away the power of making assessments for local public improvements. The court said, page 295: —

"We are of opinion that the construction given was correct. It is impossible to apply to the varying wants of a municipality the rule invoked with reference to taxation for State purposes on property throughout the State, without producing the very inequality which that rule was designed to prevent. There would often be manifest injustice in subjecting the whole property of a city to taxation for an improvement of a local character. The rule that he who reaps the benefit should bear the burden must in such cases be applied."

The court added that the same construction of a similar clause in the constitutions of other States had been adopted by their highest courts.

§ 367. Legislative discretion in apportionment.

While a few States still insist that the apportionment must be made according to a determination of special benefits in each case,[3] the trend of authority has been overwhelmingly in support of the rule that a legislative apportionment by frontage or area is allowed. Thus it was said

[1] Thus in Colorado, Denver *v.* Knowles, 17 Colo. 204, overruling Palmer *v.* Ray, 6 Colo. 106; in Maryland, In re Johns Hopkins Hospital, 56 Md. 1, overruling Baltimore *v.* Scharf, 54 Md. 499; in Alabama, Birmingham *v.* Klein, 89 Ala. 461, overruling Mobile *v.* Dargan, 45 Ala. 310. Early decisions in Minnesota and in Illinois were in effect overruled by changes in the State constitutions.

[2] Louisiana *v.* Pilsbury, 105 U. S. 278.

[3] Peay *v.* Little Rock, 32 Ark. 31. The frontage rule was denied in McBean *v.* Chandler, 9 Heisk. (Tenn.) 349, as unequal and not uniform.

by Judge Cooley in the Supreme Court of Michigan in 1881: [1] "We might fill pages with the names of cases decided in other States which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis (according to frontage) as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments and direct an apportionment of the cost by frontage, should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the law of taxation have collected the cases and have recognized the principle as settled, and if the question were new in this State, we might think it important to refer to what they say. But the question was not new; it was settled for us thirty years ago."

Judge Dillon said in 1891, after reviewing the State cases: [2]—

"The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency."

§ 368. Consideration of special benefits excluded by legislative apportionment.

The apportionment of the cost of a public improvement

[1] Sheley *v* Detroit, 45 Mich. 431, l. c. page 433.

[2] Dillon's Municipal Corporations, 4th Ed., Vol. 2, § 752.

by a definite rule, as by frontage or area in the taxing district, has been held necessarily to exclude evidence of the want of special benefits in the enforcement of assessments upon the property, as the legislative determination in ordering the assessment upon that basis presumptively involves the finding that the property is benefited to the extent of the assessment.

This conclusiveness of the legislative decision in the formation of taxing districts is said therefore to rest upon the presumption that the legislature proceeds upon investigation and inquiry, and decides what the public good requires; that it only creates a taxing district and charges the expense of a public improvement upon it when satisfied that the property therein will be specially benefited by the improvement.[1] The courts in sustaining this doctrine of legislative conclusiveness, recognize that its real basis is the impracticability of making any satisfactory judicial apportionment of the benefits from such improvements as between the abutting property and the general public. In the language of the Supreme Court of North Dakota:[2] "How could the courts ever determine what part should be paid out of the general treasury and what part raised by local assessment? What rule would govern them in investigating such a question? And what right have they to dictate where the line shall be drawn?"[3]

[1] Spencer *v.* Merchant, 125 U. S. 345, affirming 100 N. Y. 587.

[2] Ralph *v.* Fargo, 7 N. Dak. 640, l. c. p. 650.

[3] The difficulty of drawing the line between the general benefit to the public and the special benefit to the property owner is illustrated not only in street improvement cases but in such matters as street sprinkling. Thus it was held in Minnesota, State *v.* Reis, 38 Minn. 371, that *street sprinkling* is a public improvement for which a special assessment can be made; while in City of Chicago *v.* Blair, 149 Ill. 310, and 24 L. R. A. 412, and in New York Life Ins. Co. *v.* Prest, 71 Fed. Rep. 815, it was held that it is not a local improvement and that the conclusion of the local authorities that it is, is reviewable by the courts. See also Sears *v.* Boston, 173 Mass. 71, and 43 L. R. A. 834. *Street sweeping* was held a proper

§ 369. Legislative power not unlimited.

Notwithstanding this general acceptance of the doctrine that the apportionment of the cost according to a definite rule of presumed benefits is a matter of legislative discretion, excluding thereafter the judicial consideration of special benefits, it does not follow that the legislative authority in that regard is unlimited. On the contrary, this exclusion of the consideration of special benefits can only be justified on the theory that it had been determined by the municipal authorities upon investigation that the special benefits to each lot charged were equal to the assessment. Evidence of the want of special benefits is excluded only on the theory that the fact sought to be disproved has been conclusively determined in the proceedings in which the assessment was made. Thus it was said by the Supreme Court of Massachusetts:[1] —

charge for local assessments in Reinken *v.* Fuehring, 130 Ind. 382, and 15 L. R. A. 624. The cleaning of ice and snow from a sidewalk was held a proper local charge in New York, Carthage *v.* Frederick, 122 N. Y. 268, and 10 L. R. A. 178; and in Massachusetts, In re Goddard, 16 Pickering 504; but denied in Illinois, Gridley *v.* Bloomington, 88 Ill. 554; Chicago *v.* O'Brien, 111 Ill. 532. The Supreme Court of Pennsylvania in Hammett *v.* Philadelphia, 65 Pa. 146, held that the power to assess was exhausted with a single exercise for the same improvement, and maintenance and reconstruction must be a public expense. This was a street paving case and was reaffirmed in City of Erie *v.* Russell, 148 Pa. 384, in the case of a sewer. But in Missouri, McCormack *v.* Patchin, 53 Mo. 33, and Farrar *v.* St. Louis, 80 Mo. 379, the power was held to be a continuing power, unless expressly restrained by the constitution or by the charter of the city.

[1] Sears *v.* Boston, 173 Mass. 71, p. 78. The court in this case held valid an assessment for watering streets in proportion to the lineal feet as applied to occupied estates in the central portion of the city. It said that it made this decision with some hesitation, as watering produces only a temporary effect, but concluded that the *habitual* watering was a benefit to the property. But it was held in another case, Sears *v.* Street Commissioners, 173 Mass. 350, that a sewer assessment which included, in addition to the cost of the sewer, part of the general expenses of the department, was invalid. See also 2 Dillon on Municipal Corporations, 4 Ed., § 761.

"While these assessments must be founded upon benefits, the courts have generally recognized the difficulty, and in many cases the impracticability, of attempting to estimate benefits to estates one by one without some rule or principle of general application which will make the assessments reasonable and proportional, according to benefits. Accordingly, the determination of such a rule or principle by the legislature itself, or by the tribunal appointed by the legislature to make the assessments, has commonly been upheld by the courts. If, however, its effect plainly is to make an assessment upon any estate substantially in excess of the benefit received, it is set aside."

Other courts, sustaining legislative apportionment of special assessments, have been less decided in asserting this limitation of legislative authority; and the fundamental principle, that such assessments can only be justified in any case by the benefits received, has been obscured by the practical convenience of the legislative apportionment by frontage or area throughout the taxing district. Where the conditions of the parcels of land assessed are substantially uniform, as in average city lots, such apportionment by frontage or area works approximate equality. The recognition of this fact and the realization of the impracticability of judicially determining the special benefits led to the general adoption and enforcement of the rule that the legislative apportionment is conclusive, until the essential limitations of legislative authority were reasserted by the decision of the Supreme Court in Norwood *v.* Baker in 1898.[1]

§ 370. Supreme Court on assessments for municipal improvements.

The Supreme Court can only consider this subject in relation to due process of law as guaranteed by the Four-

[1] *Infra*, § 383.

teenth Amendment. Only on this ground can it overturn the system established by the State authorities and approved by the State courts. It cannot review the decisions of the State courts with reference to the construction of their own statutes and constitutions, and thus it has had no concern with the many questions which have arisen in that connection. Furthermore in questions so intimately related to the sovereignty of the State as the exercise of the State power in establishing taxing districts and apportioning the burden of taxation for the cost of public improvements, it would necessarily require a clear case of violation of right under the Federal Constitution, before the Supreme Court would interfere with the exercise of legislative discretion under the State laws as approved by the State courts. The Supreme Court has considered this question not only in cases from the State courts, where the protection of the Fourteenth Amendment was invoked,[1] but also in cases from the District of Columbia where the same claim was made in reference to the Fifth Amendment [2] restraining the power of Congress; and it will be convenient therefore to consider the decisions of the court in relation to the different classes of

[1] Hagar *v.* Reclamation District, *supra*, § 319; Irrigation District *v.* Bradley, *supra*, § 362; Wurts *v.* Hoagland, *supra*, § 361; Davidson *v.* New Orleans, 96 U. S. 97; County of Mobile *v.* Kimball, 102 U. S. 691; Spencer *v.* Merchant, 125 U. S. 345; Kerr *v.* South Park Commissioners, 117 U. S. 379; Walston *v.* Nevin, 128 U. S. 578; Lent *v.* Tillson, 140 U. S. 316; Paulsen *v.* Portland, 149 U. S. 30; Corry *v.* Campbell, 154 U. S. 629; Norwood *v.* Baker, 172 U. S. 269; Bellingham Bay, etc., Co. *v.* New Whatcom, 172 U. S. 314; Loeb *v.* Columbia Township Trustees, 179 U. S. 472; French *v.* Barber Asphalt Co., 181 U. S. 324 (and following cases); Farrell *v.* West Chicago Park Commissioners, 181 U. S. 404; Lombard *v.* Park Commissioners, 181 U. S. 38; Carson *v.* Brockton Sewerage Co., 182 U. S. 398; King *v.* Portland, 184 U. S. 61; Voigt *v.* Detroit, 184 U. S. 115; Goodrich *v.* Detroit 184 U. S. 432.

[2] Welland *v.* Presbury, 14 Wallace 676; Mattingly *v.* District of Columbia, 97 U. S. 687, Shoemaker *v.* United States, 147 U. S. 282; Bauman *v.* Ross, 167 U. S. 548; Parsons *v.* District of Columbia, 170 U. S. 45; Wight *v.* Davidson, 181 U. S. 371.

public improvements. It will be observed however that in cases from the District of Columbia, the court exercised a broader jurisdiction in determining the validity of the action of Congress in its powers over the District, than it assumed in reviewing the decisions of the Supreme Courts of the States. In the latter cases it was limited to the constitutional question, in the former it was not.

§ 371. Supreme Court on assessments for sewers.

In the matter of sewers there is a natural benefited district, to wit, the territory drained, and as to such cases the courts have had little difficulty in accepting the conclusiveness of the legislative determination regarding the property benefited.[1] In Paulsen *v.* Portland, the court held that in making a taxing district out of the area drained by a sewer, no notice to or assent by the taxpayer was necessary. The sewer in question was constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will. So also it is for the legislature to determine the territorial district to be taxed for the local improvement.

In a case from Massachusetts the court held valid an ordinance making an annual assessment upon property owners for the use of a common sewer, which had been built by assessments upon the property benefited.[2]

In a case from the District of Columbia,[3] the court sustained an assessment, under Act of Congress, in the District of Columbia, where one-third of the cost of the sewer was taxed upon the property adjoining, according to frontage, for the enlargement of the sewer. In this case the assessment was confirmed by Act of Congress, which

[1] Gillette *v.* City of Denver, 21 Fed. Rep. 822, Brewer, J.; Paulsen *v.* Portland, 149 U. S. 30.

[2] Carson *v.* Brockton Sewerage Commission, 182 U. S. 398.

[3] Mattingly *v.* District of Columbia, 97 U. S. 687.

the court held was equivalent to an authorization, adding at page 692: —

"It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property at its discretion, is, under the decisions, no longer an open question."

§ 372. Supreme Court on assessments for streets and sidewalks.

The same principle has been applied to the opening, widening, and paving of streets and sidewalks. Thus an assessment under the statute of New York making a taxing district of the lands lying within three hundred feet on either side of the street improved was sustained and held valid as to all parcels of land which were included within that district, though some of them did not front upon the street.[1] The court affirmed the judgment of the New York Court of Appeals, which had said in its opinion: "The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason;" and added at page 355: —

"The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of

[1] Spencer *v.* Merchant, 125 U. S. 345, and New York Court of Appeals, 100 N. Y. 587.

lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. * * * If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. * * *

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners." [1]

The Act of Congress for opening streets in the city of Washington and providing for apportioning one-half of the cost upon the lands found to be benefited was sustained as not violative of the Fifth Amendment.[2] The court said that it was for the legislature and not for the judiciary to determine, whether the expense of a public improvement should be borne by the whole city, or by the district, or by the property immediately benefited. The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be fixed in proportion to the frontage, area, or the market value of the lands, or in proportion to the benefits as estimated by the commissioners. It was within the power of Congress

[1] Justice Matthews and Justice Harlan dissented.

[2] Bauman *v.* Ross, 167 U. S. 548.

to include as benefited all lands lying within the benefited district, and Congress might submit the question of what parcels of land were benefited to the determination of the tribunal intrusted with the authority of making the assessment.

In a later case from the District of Columbia,[1] the validity of an act making an assessment at the rate of $1.25 per lineal foot upon property abutting on streets where a water main was laid was sustained by the Supreme Court, which held that the action of Congress was conclusive alike of the question of the necessity of the work and of the benefit to the abutting property. The court said in this case that there was an obvious necessity for a system to supply the inhabitants with a constant and unfailing supply of water, an essential for health, comfort and safety next in importance to air. The citizen cannot be heard to contend that he is entitled to receive such advantages gratuitously, nor that the laws and ordinances under which they are created and regulated are invalid, unless his individual and personal views have been formally obtained and considered.[2]

[1] Parsons *v.* District of Columbia, 170 U. S. 45.

[2] In Provident Institution *v.* Jersey City, 113 U. S. 506, an act passed prior to the date of plaintiff's mortgage made water rents a charge upon lands in Jersey City, though at the date of the mortgage there were no valid water rents due on the mortgaged property. Plaintiff contended that the statutes, by giving a superior lien to water rents afterwards accrued, deprived it of its property without due process of law, but the court held that, since plaintiff took the mortgages subject to the statute, it had no ground to complain. And even if the mortgages had been created before its passage, the statute would be valid. That which is given for the betterment of the common pledge is in natural equity entitled to first place among the claims against it. Providing a sufficient water supply for the inhabitants of a great and growing city, is one of the highest functions of municipal government, and tends greatly to enhance the value of all real estate in its limits. It might be difficult, the court concluded, to show any substantial distinction between such charge for water and a tax, but the case at bar did not call for an opinion on that point.

§ 373. **Benefit districts for street improvements.**

A Kentucky statute authorized the city government of Louisville to open and improve streets at the exclusive cost of the owners of lots in each one-fourth of a square, to be equally apportioned by the council according to the number of square feet owned by them respectively, except that corner lots of prescribed dimensions paid twenty-five per cent more than others, each subdivision of territory bounded on all sides by principal streets being deemed a square. This statute had been sustained by the Kentucky Court of Appeals,[1] and its judgment was affirmed on motion by the Supreme Court, as the contention had been pressed upon them before and determined adversely, so that there was no necessity for its being argued.[2]

§ 374. **Special assessments for public parks.**

It was said by the Supreme Court in a case from the District of Columbia,[3] involving an assessment for a public park established under Act of Congress for the District of Columbia, that in the memory of men now living the proposition to take private property without the consent of its owner for a public park and assess a proportionate part of the cost upon the real estate benefited would have been regarded as a novel exercise of the legislative power. But the adjudicated cases determine, not only that the establishment of a public park is a public use, but that the judicial function is exhausted when this question is decided, and that the extent to which such private property shall be taken for such use rests wholly in the legislative discretion.[4]

[1] Preston *v.* Roberts, 12 Bush 57; Beck *v.* Obst, 12 Bush 268; Broadway Baptist Church *v.* McAtee, 8 Bush 508.

[2] Walston *v.* Nevin, 128 U. S. 578. Another case of summary disposition was in Corry *v.* Campbell, 154 U. S. 629.

[3] Shoemaker *v.* United States, 147 U. S. 283.

[4] Kerr *v.* South Park Commissioners, 117 U. S. 379; Farrell *v.* West

§ 375. If assessment is set aside, reassessment may be made.

Where an improvement has been ordered and the assessment made to pay for it has been adjudged invalid or has proven ineffective for any reason, an act of the legislature authorizing a reassessment in the taxing district involves no violation of the rule requiring due process of law,[1] although the reassessment includes interest on the unpaid old assessments and part of the expense of levying them.

In a later case involving the validity of a reassessment by the West Chicago Park Commissioners under the laws of Illinois, it was said to be no longer open to question that, where a special assessment to pay for a particular park has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the completed work.[2]

This principle, that the invalidity for any reason of a special assessment does not release the property from the obligation to pay its proper share of the cost of the improvement on the due ascertainment thereof by a reassessment lawfully made, is illustrated, in the case of Norwood *v.* Baker, *infra*, § 383, where the assessment was set aside as wanting in due process of law. The court said that the legal effect of the injunction granted by it was only to prevent the enforcement of the particular assessment in question. It left the village in its discretion to take such steps as were within its power, either under existing statutes or under any authority which might thereafter be conferred upon it, to make a new assessment upon the plain-

Chicago Park Commissioners, 181 U. S. 404; Lombard *v.* West Chicago Park Commissioners, 181 U. S. 38.

[1] Spencer *v.* Merchant, 125 U. S. 345.

[2] Lombard *v.* West Chicago Park Commissioners, 181 U. S. 33; Bellingham Bay Co. *v.* New Whatcom, 172 U. S. 314, affirming 16 Wash. 131.

tiff's abutting property for so much of the expense of opening the street, as was found upon due and proper inquiry to be equal to the special benefits accruing to the property.[1]

§ 376. Notice and opportunity for hearing.

The general principle, that there must be some opportunity for hearing at some stage of the procedure, discussed in Chapter XI in relation to general taxation, applies with special force to local assessments and for the reason there explained, that assessments for special taxes are not made at stated periods as in general taxation, but whenever the legislative discretion determines that the improvement shall be made at local expense. There is therefore a necessity for notice and opportunity for hearing, which does not exist in the case of general taxation.

Wherever the cost of a public improvement is apportioned according to the judgment of commissioners or other tribunal as to the special benefits accruing to the property in the district, there must be notice and opportunity for hearing allowed to the taxpayer before such tribunal on the question of the benefits accruing to his property, and the amount of tax to be assessed against him.[2] It is not enough that he may by chance have notice, or as a matter of fact have a hearing. It is immaterial that the assessment has in fact been fairly apportioned. The constitutional validity of the law is to be decided, not by what has been done under it, but by what by its authority may be done.[3] The construction of the State statutes by the State courts as requiring notice will however be conclusive upon the Supreme Court.

[1] Norwood *v.* Baker, 172 U. S. 269, l.c. 293.

[2] Hagar *v.* Reclamation District, *supra*, § 319, and cases cited.

[3] Stuart *v.* Palmer, 74 N. Y. 183; St. Louis *v.* Ranken, 96 Mo. 497; Heth *v.* Radford, 96 Va. 272.

But due process of law does not require in special assessments, any more than in general taxation, that there should be a formal or plenary judicial proceeding or any interposition of judicial authority. The assessment and collection of taxes, general and special, belong to the legislative and executive, and not to the judicial, departments of the government. Neither is a rehearing or new trial essential to due process of law.[1]

The general rules stated in Chapter XI as to the essentials of notice apply to special assessments, subject to the distinction stated, that there is a reason for notice and opportunity for hearing which does not exist in general taxation. The publication of a notice that it is proposed to present a petition for a public improvement is a sufficient notification to those interested in the question, when such notice carries with it an opportunity to be heard.[2]

§ 377. Notice and hearing under legislative apportionment.

When the apportionment is not made by commissioners or other *quasi* judicial authority, but by the legislature, such legislative determination may exclude any subsequent hearing upon the question determined. This question was decided by the Supreme Court[3] in affirming the judgment of the New York Court of Appeals. The court said that when the determination of the lands to be benefited is intrusted to commissioners, its owners may be entitled to notice and hearing upon the question whether their lands have been benefited, and how much. But the legislature has the power to determine by the statute imposing the

[1] See Chapter XI, "Essentials of Notice and Hearing." See also Lent *v.* Tillson, *supra*, § 328; Paulsen *v.* Portland, 149 U. S. 30.

[2] Fallbrook Irrigation District *v.* Bradley, *supra*, § 362; Hagar *v.* Reclamation District, *supra*, § 319.

[3] Spencer *v.* Merchant, *supra*, § 375.

tax what lands, which might be benefited by the tax, are in fact benefited by it, and if it does so, the determination is conclusive upon the owners and the courts. The owners in such case have no right to a hearing upon the question whether their lands are benefited, but only upon the validity of the assessment and its apportionment among the different parcels of the class decided upon by the legislature. This is in accordance with the general principle that there is no right to a hearing upon a question which has been determined by the exercise of legislative discretion.

But this rule, that notice and hearing are not required where they can be of no effect, has been applied not only to the legislative creation of the taxing district and determination of what part, if any, of the total cost is to be assessed upon the district, but further to the decision by the legislature as to the basis of apportionment within the district, that is, whether according to special benefits, or value, or area, or frontage. Therefore, if that body concludes that the cost shall be assessed according to special benefits or according to value, the determination of such benefit or value requires notice and opportunity for hearing. But if the legislature determines for itself that an apportionment according to area, or according to frontage, corresponds to the benefits received, it follows that the calculation on that basis is a mere matter of figures, and no notice or hearing thereon is required.[1] It results therefore that the establishment of such a rule of area or frontage excludes the consideration of special benefits.

Theoretically this determination by legislative or munici-

[1] In Amery *v.* Keokuk, 72 Iowa 701 it was said: "It appears to have been quite uniformly held that where the only act necessary to ascertain the amount of the assessment upon the property is a plain mathematical calculation, and no discretion is left to the city council, no notice is necessary."

pal authority is made upon investigation of the special benefits accruing to all the property. But under the prevailing system of fixing the basis of apportionment in the charter or enabling statute, the municipal authorities have only the discretion of determining what and when improvements shall be made, and the theory of "presumed investigation" and "conclusive discretion" in the exercise of such municipal authority may practically deprive the property owner, not only of any judicial protection, but also of any hearing upon the question of benefits from the improvement.

This logical outcome of the premises was the occasion of the sharp division of the Supreme Court in the notable case of Norwood *v.* Baker.[1] Although that decision was subsequently limited to its "special facts," the re-examination of the fundamental basis of special assessments in this and subsequent cases has resulted as hereafter shown, not only in the reaffirmation of the salutary principle that the judicial authority is supreme in enforcing the limitations of the legislative power, but also in the enforcement of the right of the property owner to notice and opportunity for hearing upon the question of benefits at some stage before the municipal action makes the assessment a binding charge against his property.

§ 378. Hearing not required before including property in benefited district.

Due process of law does not require notice to the property owner nor an opportunity for hearing, before a legislative or municipal authority forms the taxing district and determines the maximum amount to be apportioned thereto, provided he is given notice and allowed a hearing as to the amount to be assessed against his own property, and it is

[1] *Infra*, § 383.

provided by the statute or charter, as construed by the Supreme Court of the State, that the amount of taxes which may be assessed upon any given parcel shall not exceed the benefits thereto. This was determined by the Supreme Court in a recent case from Detroit,[1] where the court said that it was not necessary for the property owner to have notice of every step in the proceeding. It is sufficient if he is given a thoroughly efficient opportunity to be heard to test the legality of the charge upon him for it is only with the charge upon him that he is concerned, and of that alone can he complain. In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence. This ruling however was based upon the finding of the Supreme Court of the State, that under the statute the amount of assessment upon any lot of land could not exceed the benefits, and that, at the hearing allowed the property owner, he could show that this rule had been violated, and this showing would have relieved his land from the tax.

§ 379. Notice to parties liable to be assessed in street openings not required.

Where a statute providing for the opening of streets or other public improvements requires notice to the parties whose land is to be taken for public use, and the damages paid for the property so taken are assessed as benefits against the property in a district which it is determined will be benefited by the improvement, the fact that there is no provision for giving notice to the owners of land liable to be assessed for the improvement by being included in such benefited district does not deprive them of their property without due process of law.

[1] Voigt *v.* Detroit, 184 U. S. 115, affirming 123 Mich. 547.

This was decided in another case from Detroit,[1] where it was argued that parties liable to be assessed for benefits are as much interested in the question as to the necessity of making the improvement and the amount of compensation to be paid for the land taken therefor as are the owners of the land taken, and that the same reasons for notice apply in the one case as in the other. But the court said:—

"But whatever weight be given to these authorities, the law in this court is too well settled to be now disturbed, that the interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands for such improvements, in which they have no direct interest. The position of the plaintiffs in this particular would require a readjustment of the entire proceedings, and a determination of the property incidentally benefited, before any proceedings are taken for the condemnation of land directly taken or damaged by such improvement. It might be argued upon the same lines that, whenever the city contemplated a public improvement of any description, personal notice should be given to the taxpayers, since all such are interested in such improvements and are liable to have their taxes increased thereby. It might easily happen that a whole district or ward of a particular city would be incidentally benefited by a proposed improvement, as, for instance, a public school, yet to require personal notice to be given

[1] Goodrich *v.* Detroit, 184 U. S. 432, affirming 123 Mich. 559. In support of complainant's contention the following cases were cited and referred to in the opinion of the court, Paul *v.* Detroit, 32 Mich. 108; Wells County *v.* Fahlor, 132 Ind. 426; State *v.* Fondulac, 42 Wisc. 287; Stuart *v.* Palmer, 74 N. Y. 183; Scott *v.* Toledo, 36 Fed. Rep. 385 and 1 L. R. A. 688.

to all the taxpayers of such ward would be an intolerable burden. Hence it has been held by this court that it is only those whose property is proposed to be *taken* for a public improvement that due process of law requires shall have prior notice."

It will be observed however that this only applies to the notice and hearing before the taxing district is made. After the improvement is ordered and the taxing district determined, the right of the property owner to notice and hearing on the question of the validity of the charge against him remains, and is determined upon the principles discussed in the preceding section.

§ 380. **Express finding of benefits not required.**

Although the power to make special assessments upon property for public improvements is based upon the assumption that such property is specially benefited to the amount of the assessment, and the statute may authorize such assessment only upon a prior determination that the property assessed will be thus benefited, it is sufficient that the proceedings show a substantial compliance with this requirement. Due process of law, in the matter of special assessments as in other cases, looks to substance rather than to form. Thus a statute of Michigan provided that if the common council believed that a portion of the city would be benefited by a certain improvement, they might determine that the whole or any just proportion of the cost of the improvement should be assessed, etc., upon the real estate deemed to be thus benefited, and thereupon they should by resolution fix and determine the portion of the city benefited, and specify the amount to be assessed upon the owners of the real estate therein. It was held[1] that a resolution that the "common council do hereby fix and

[1] Goodrich *v.* Detroit, 184 U. S. 432, 439.

determine that the following district is benefited and that there be assessed upon the several parcels of real estate therein the amount of —— dollars in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement," was a substantial if not a literal compliance with the statute. The court said that, whether it was a compliance or not, there was no want of due process of law, because under another provision of the statute, as construed by the Supreme Court of the State, the property owner was entitled to a hearing, wherein he could insist that his property was not benefited at all.

§ 381. Enforcement of special assessments.

The subject of procedure in tax collection, as discussed in Chapter XI, applies also to special assessments which are levied and collected under the taxing power.[1] The rule requiring due process of law is complied with if the taxpayer has a hearing as to the validity of the charge upon his property, at any stage of the proceedings. Thus if the assessment can only be enforced by a plenary suit or a more summary form of judicial procedure, and the taxpayer is allowed an opportunity to set up any defense as to the legality of the charge, the requirements of due process of law are satisfied. In some States the taxpayer is allowed to appear before the council or other municipal authority, and make his objections both as to the necessity of the improvement, and also to the apportionment of benefits between the city and the district. Then, in a suit to enforce the collection of the assessment, he is limited to questions relating to the performance of the work, and such limitation when notice and opportunity for hearing are afforded before the work is done, is no violation of due process of law.

[1] Speer *v.* Athens (Geo.), 9 L. R. A. 402.

It was said in a recent opinion of the Supreme Court,[1] in a suit to enjoin the collection of an assessment for opening a street, that the plaintiff could not urge as a ground of injunction that the lands in the condemnation proceeding were defectively described. Not only was it a collateral matter so far as plaintiff was concerned, but it is extremely doubtful whether a simple misdescription involves any Federal question whatever.

But it was held in a State court [2] that a clause of a city charter, providing that the owner of real estate should, within sixty days from the date of the issuance of the tax bill, file with the Board of Public Improvements a written statement of all his objections to the validity of the bill, and that in a suit on the tax bill no objection should be pleaded other than those which had been so filed, was void as a deprivation of property without due process of law, and that plaintiff could make all the defenses to the tax bill allowed by law regardless of such provision. The court said in this case that there is a distinction between requiring a man, who proposes taking some affirmative legal action, to do so within a limited time and requiring him to state in advance his defenses to a future suit. The law does not compel a man who is unassailed to pay any attention to unlawful pretenses which are not asserted by possession or suit.

§ 382. **Conclusiveness of State determination.**

In the determination of any question of fact such as the necessity for a public improvement, the amount of special benefit accruing to the district, or valuations in the apportionment of special assessments, the decision of the proper

[1] Goodrich *v.* Detroit, 184 U. S. 432.

[2] Barber Asphalt Paving Co. *v.* Rich, Sup. Ct. of Missouri, 68 S. W. Rep. 1043.

State tribunal, in the absence of actual fraud and bad faith, is conclusive.[1] Erroneous decisions on questions of fact submitted to such tribunals do not violate any provision of the Federal Constitution.[2] Even bad faith or fraud on the part of State officials making the assessment involves no constitutional element, and the remedy therefor depends upon the ordinary jurisdiction of courts of justice over that class of cases. When the matter comes before the Supreme Court on writ of error to the highest court of the State, only the Federal question can be considered, and the court in considering that question is concluded by the construction of the State statute by the State court.[3] The same rule, that the State court's construction is conclusive, applies if the case is construed by the Supreme Court on appeal from the United States Circuit Court.

§ 383. Supreme Court in Norwood v. Baker.

The principle of the conclusiveness of legislative determination in fixing the basis of apportionment in special assessments and the exclusion of any consideration of special benefits in the enforcement of special assessments upon such statutory apportionment, which seemed to have become thoroughly intrenched in American jurisprudence, received a severe shock from the decision of the Supreme Court in the case of Norwood *v.* Baker, decided in 1898

[1] It was held in California, Ramish *v.* Hartwell, 126 Cal. 443, that while the legislature had no power to make the recitals of bonds issued, payable from proceeds of special assessments, conclusive evidence of the validity of the lien for street improvements, the recitals could be made conclusive evidence of the regularity of the proceedings not essential to jurisdiction of the officers to create the assessment.

[2] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, l. c. 167; see also Lent *v.* Tillson, 140 U. S. 315.

[3] For a forcible illustration of this see King *v.* Portland, 184 U. S. 61; Voigt *v.* Detroit, *supra*, § 378; Goodrich *v.* Detroit, *supra*, § 380.

on appeal from the United States Circuit Court, Southern District of Ohio.[1]

The constitution of Ohio authorized the taking of private property for the purpose of making public roads, on paying to the owner compensation to the amount assessed by a jury without deduction for benefits. The statutes of Ohio provided, in case of the opening of a new road, for a special assessment by the front foot upon bounding and abutting property of the entire cost and expense of the improvement, making no provision for the consideration of special benefits. A street was opened through the property of complainant three hundred feet long and fifty feet wide, to connect two streets of that width which ran from each end of complainant's property in opposite directions. The jury gave plaintiff $2,000 damages, irrespective of any benefits. The village then assessed her with the cost of opening and making this street, including the solicitors' and experts' fees and advertising, in all $2,218. Complainant brought suit to restrain the village from enforcing this assessment. The sum awarded by the jury had been paid to the plaintiff, and it was this sum with costs and charges which the village was undertaking to assess back upon her. The Circuit Court granted a decree to plaintiff on the ground that the assessment was in violation of the Fourteenth Amendment, providing that no State should deprive any citizen of his property without due process of law.

The Supreme Court, after holding that the taking of plaintiff's land for the street was under the power of eminent domain, and that abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property, said, by Justice Harlan:[2] "Such assessments, according to well-established principles, rest upon the ground that special burdens may

[1] 172 U. S. 269.

[2] l. c. page 278.

be imposed for special or peculiar benefits accruing from public improvements;" and "if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what property shall belong to such district, and what property shall be considered as benefited by a proposed improvement."

"But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received.

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." * * *

After reviewing authorities, the court proceeds: —

"It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in respect of the land taken for the street; for, by opening the street at his own cost, he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles, upon which rests the power to make special assessments upon property in order to meet the expense of public improvements in the vicinity of such property."

It was not necessary for plaintiff to show the excess of cost over her special benefits, as the assessment was by the front foot irrespective of special benefits, so that the assessment was illegal in itself, because it rested upon a basis which excluded any considerations of benefits. The decree enjoining the whole assessment was therefore the only proper one. But the injunction did not prevent a re-assessment for such amount as could be assessed against the

property upon a due and proper inquiry as to the special benefits accruing.

The court added that the assessment was also invalid under the constitution of Ohio which required that compensation be made for private property taken for public use, and that such compensation be assessed without any deduction for benefits to the property of the owner. This provision would be of little practical value if, upon the opening of a public street through private property, the owner could be assessed, not only for an amount equal to the benefits received, but also for such additional amount as would meet the excess of expense over the benefits.[1]

§ 384. Norwood v. Baker in State courts and United States courts.

So firmly had the rule of legislative conclusiveness become established in the different States that this decision in many places put a stop to public work, especially in localities where the area and frontage rules were established by statute or city charters excluding the consideration of special benefits in individual cases. The Supreme Court of the District of Columbia held that the decision invalidated all procedures which did not provide a judicial inquiry as to special benefits.

In some of the State courts this construction was given

[1] Justice Brewer, with whom Justices Shiras and Gray concurred, dissented on the ground, among others, that when a public improvement has been made, it is, beyond question, a legislative function to determine conclusively the area benefited thereby. The opinion of the majority, he said, went so far as to hold that the legislative determination is not conclusive, and that in all cases there must be a judicial inquiry as to the area in fact benefited, adding: "We have often held the contrary, and I think should adhere to those oft-repeated rulings."

[2] Fay *v.* Springfield, 94 Fed. Rep. 409; Loeb *v.* Trustees, 91 Fed. Rep. 37; Charles *v.* Marion City, 98 Fed. Rep. 166; Cowley *v.* Spokane, 99 Fed. Rep. 840; Davidson *v.* Wight, 16 D. C. App. 371; Lyon *v.* Tonawanda, 98 Fed. Rep. 361; Parker *v.* Detroit, 103 Fed. Rep. 357.

to the decision, while others limited the case to the special facts, involving both the power of eminent domain and the right of assessment for public improvements, and held that their method of apportionment of costs by the area and frontage rules did not necessarily come within the scope of the judgment. The latter was the decision in Missouri,[1] Michigan,[2] North Dakota,[3] Illinois,[4] Pennsylvania,[5] New York,[6] California,[7] Wisconsin,[8] and Kentucky.[9] In Indiana[10] it was held by the Supreme Court that a statute, which authorized the improvement of a street and the assessment of the cost under the frontage rule, was made valid by the allowance to property owners of opportunity for a hearing as to special benefits, the frontage rule being considered to raise only a *prima facie* standard. It was said however that prior to the decision in Norwood *v.* Baker the ordinance would have been held valid without the provision for hearing.

The Supreme Court of Massachusetts held[11] that the assessment upon the property-owners of the expense of watering the streets under the frontage rule was approximately an accurate method of determining the benefits, and therefore distinguished the case from Norwood *v.* Baker.

The Supreme Court of Minnesota,[12] following Norwood *v.* Baker, held that the principle involved was not confined

[1] French *v.* Barber Asphalt P. Co., 158 Mo. 534.
[2] Cass Farm Co. *v.* Detroit, 124 Mich. 433.
[3] Webster *v.* Fargo, 9 N. Dak. 208.
[4] Farrell *v.* West Chicago Park Commissioners, 182 Ill. 250.
[5] Harrisburg *v.* McPherran, 200 Pa. 343; *aliter*, Scranton *v.* Levers, 9 Pa. Dist. 176.
[6] Conde *v.* City of Schenectady, 164 N. Y. 258.
[7] Hadley *v.* Dague, 130 Cal. 207.
[8] Gleason *v.* Waukesha Co., 103 Wis. 225.
[9] City of Augusta *v.* McKibben, 22 Ky. Law Rep. 1224.
[10] Adams *v.* Shelbyville, 154 Ind. 467.
[11] Sears *v.* Boston, 173 Mass. 71.
[12] Ramsey County *v.* Robt. P. Lewis Co., 53 L. R. A. 421, l. c. p. 423.

to a street opening case, but extended to all cases of local public improvements; that the real principle involved was that of having a basis of apportionment upon the abutting property, which should exact contribution only in consideration of special benefits, and that this appeared from the dissenting opinion of Justice Brewer. The court therefore held invalid the assessment of the annual frontage taxes for water pipes laid in front of the lots assessed, saying: "Prior to the appearance of the case of Norwood *v.* Baker, perhaps the trend of the decisions in this country was in support of the theory that the legislative power in respect to special assessments was practically unlimited, and since that case was decided, the State courts have not been agreed as to its scope and meaning. Probably no decision emanating from the Supreme Federal Court for many years has been so sweeping and at the same time so imperfectly understood and applied." The court said in concluding, at page 427:—

"The stake driven by the decision in Norwood *v.* Baker is timely. Judicial expression on the subject was indefinite. There was a tendency to lose sight of the equitable basis which justifies the assessment upon private property of the cost of public improvements. The arbitrary act of the legislative body was often accepted as final without regard to its justice. It is to be hoped that the highest court of the land has spoken finally and will not recede from its position."[1]

[1] After the above decision was announced, the Supreme Court decided the case of French *v.* Barber Asphalt Paving Co., and the other cases in 181 U. S., *infra*. Thereupon the Minnesota court, by the same judge, on June 18, 1901, sustained a motion for rehearing and reversed the former decision, saying that if the case was one of final jurisdiction of that court it would adhere to its former opinion. But after considering the decision of the Supreme Court in French *v.* Barber Asphalt Paving Co. and the other cases concurrently decided, wherein that court attempted to qualify and limit the principles applied in Norwood *v.* Baker,

§ 385. Norwood v. Baker limited to its "special facts."

But the far-reaching character of the decision in Norwood *v.* Baker and the widely different judicial views as to its effect resulted in a number of cases from different parts of the country, involving the validity of systems of procedure under the area and frontage rules of apportionment. These were appealed to the court, and having been advanced upon the docket, were heard together at the October term, 1900. One of them[1] was from Missouri, wherein the Supreme Court of that State had declined to apply the doctrine

it was in doubt as to the effect of these holdings. It did not appear that the Supreme Court had directly denied the soundness of the rule announced, yet it seemed to intend to hold that "the principle will not apply when in conflict with the systems of taxation as adopted by a State, unless, in some special case, peculiar and extraordinary hardship is the result. In other words, it is not the principle or rule of assessment which is the test of the validity of the State act, but, rather, the effect of the application of the rule in particular cases. It may be a sound rule in one case, and not in another. It would be useless at this time to further attempt to define the position of the Federal court as expressed in its later decisions." The court said that its own decisions had sustained this method of assessment, State *v.* Robert P. Lewis Co., 72 Minn. 87, and 42 L. R. A. 639. It therefore reversed its decision, being influenced by the fact that the property owner might have its final conclusion reviewed by the Supreme Court of the United States on writ of error, but if it adhered to its former decision the judgment would be conclusive. 53 L. R. A. 428.

The decision in Norwood *v.* Baker was followed and applied in Texas, Hutcheson *v.* Storrie, 92 Texas 685, and 45 L. R. A. 289, where the frontage rule to the exclusion of special benefits was held invalid. But in Ohio, Schroder *v.* Oerman, 47 L. R. A. 156, the court refused to declare a frontage assessment invalid, holding that the Norwood case did not control, because it appeared that an issue was made by the pleadings, whether the land assessed was in fact benefited, which issue was found by the trial court against the complainant, and furthermore it was neither shown nor claimed that the expense was not fairly apportioned between plaintiff's property and other property affected by the assessment. It was not necessary that the council's proceedings should show affirmatively that the question of benefit to the lands was taken into consideration in the levying of the assessment.

[1] French *v.* Barber Asphalt Co., 181 U. S. 324.

of Norwood *v.* Baker to tax bills levied according to the frontage rule for street improvements in Kansas City. Another had been appealed from a similar decision upon the frontage rule by the Supreme Court of the State of North Dakota.[1] The others were two frontage rule cases, one from the Supreme Court of Michigan[2] and the other from the Supreme Court of Illinois,[3] and an area rule case, involving the construction of a sewer, from the Supreme Court of Missouri.[4]

In all of these cases the State courts had affirmed the validity of the tax bills or tax procedure, declining to apply the rule of Norwood *v.* Baker, so that in each case a writ of error was taken out by the party affirming that he was deprived of his property without due process of law. At the same time there were presented to the court cases appealed from the United States Circuit Courts in the Northern District of New York[5] and the Eastern District of Michigan,[6] wherein those courts had enjoined the enforcement of the frontage rule, and also a case from the Court of Appeals of the District of Columbia,[7] which had applied the rule of Norwood *v.* Baker, under the Fifth Amendment to the Constitution and held invalid the procedure established by Act of Congress for the opening and improvement of streets in that jurisdiction. In all of these cases the Supreme Court, opinion by Judge Shiras, held that the tax assessments apportioned according to the frontage and area rule, with no hearing as to special benefits, involved no deprivation of property without due process of law; that the case

[1] Webster *v.* Fargo, 181 U. S. 394.
[2] Cass Farm Co. *v.* Detroit, 181 U. S. 396.
[3] Farrell *v.* West Chicago Park Commissioners, 181 U. S. 404.
[4] Shumate *v.* Heman, 181 U. S. 402.
[5] Tonawanda *v.* Lyon, 181 U. S. 389.
[6] Detroit *v.* Parker, 181 U. S. 399.
[7] Wight *v.* Davidson, 181 U. S. 371.

of Norwood *v.* Baker was to be "limited to its special facts" and was not intended to establish the principle, indeed it did not necessarily import, that the assessment of the cost of a local improvement against abutting property according to frontage was invalid unless the law provided for a preliminary hearing as to the benefits to be derived by the property. The court said its legal effect was only to prevent the enforcement of the particular assessment in question, adding, page 345: —

"That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in Parsons *v.* District of Columbia, 170 U. S. 45, 56, and in Spencer *v.* Merchant, 125 U. S. 345, 357.

"It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of the majority of the judges of this court, was the nature and effect of the proceedings in the case of Norwood *v.* Baker."[1]

[1] Justice Harlan with Justices McKenna and White dissented in a vigorous opinion. As Justices Shiras and Gray concurred in the dissenting opinion of Justice Brewer in Norwood *v.* Baker, it follows that Justices Fuller, Peckham and Brown, who concurred in the opinion in Norwood *v.* Baker, concurred also in these decisions limiting it to its "special facts." It was said in the dissenting opinion, pp. 352, 353: "Does the court intend in this case to overrule the principles announced in Norwood *v.* Baker? Is it the purpose of the court, in this case, to overrule the doctrine that taxation of abutting property to meet the cost of a public improvement — such taxation being for an amount in substantial excess of the special benefits received — will, *to the extent of such excess*, be a taking of private property for public use without compensation. That taxation of abutting property to meet the cost of a public improvement or any substantial excess of the special benefits is, to the extent of such excess, a taking of private property for public use without compensation? The opinion of the majority is so worded that I am not able to

The court said, in the frontage case from Kansas City, that there was no showing of any difference in the value of the lots abutting on the improvement, and that the procedure followed had been orderly, under the scheme of local improvements prescribed by the legislature and approved by the courts of the State as consistent with constitutional principles.

In the case from the District of Columbia[1] the court stated that the District Court erred in deciding that it was intended, in the Norwood case, to overrule Bauman *v.* Ross and Parsons *v.* District of Columbia. It by no means necessarily followed that the construction consistently put upon the Fifth Amendment, maintaining the validity of the Acts of Congress relating to public improvements within the District of Columbia, was to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment in controlling State legislation. The court held also that the District Court erred in its construction of the opinion in Norwood *v.* Baker, and that it was "limited to its special facts."[2]

answer these questions with absolute confidence. It is difficult to tell just how far the court intends to go. But I am quite sure, from the intimations contained in the opinion, that it will be cited by some as resting upon the broad ground that a legislative determination as to the extent to which land abutting on a public street may be specially assessed for the cost of paving such street is conclusive upon the owner, and that he will not be heard, in a judicial tribunal or elsewhere, to complain, even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property, or even if such cost equals or exceeds the value of the property specially taxed."

[1] Wight *v.* Davidson, *supra.*

[2] The same Justices dissented, Justice Harlan saying that he could not understand what was meant by "special facts" or an "actual deprivation of property," and concluded as follows, p. 388: —

"I submit that if the present case is to be distinguished from Norwood *v.* Baker, it should be done upon grounds that do not involve a misapprehension of the scope and effect of the decision in that case. If Congress can, by direct enactment, put a special assessment upon private property

In another of the series of cases,[1] wherein the Circuit Court for the Northern District of New York under authority of Norwood *v.* Baker had granted an injunction restraining the enforcement of an assessment for grading and paving a street according to the frontage rule, the court said, at page 391, in reversing the judgment of the Circuit Court, the same judges dissenting: —

"It was not the intention of the court, in that case (Norwood *v.* Baker), to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress. The case of Norwood *v.* Baker presented, as the judge in the court in the present case well said, 'considerations of peculiar and extraordinary hardships,' amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment."

In yet another of the series of cases, it was said in the prevailing opinion:[2] "We agree with the Supreme Court of North Dakota in holding that it is within the power of the legislature of the State to create special taxing districts and to charge the cost of a local improvement in whole or

to meet the entire cost of a public improvement made for the benefit and convenience of the entire community, even if the amount so assessed be in substantial excess of special benefits, and therefore, to the extent of such excess, confiscate private property for public use without compensation, it should be declared in terms so clear and definite as to leave no room for doubt as to what is intended."

[1] Tonawanda *v.* Lyon, 181 U. S. 389.

[2] Webster *v.* Fargo, 181 U. S. 395.

in part upon the property in said districts, either according to valuation or superficial area, or frontage, and that it was not the intention of this court in Norwood *v.* Baker to hold otherwise."

§ 386. Municipal bonds payable from assessments held valid notwithstanding invalidity of assessment.

It is a common practice for municipalities, when authorized by statute or charter, to provide for the payment of assessments for local improvements in annual installments, and in some States bonds are issued by the municipality payable from the proceeds of the assessments. The Supreme Court decided,[1] in a suit growing out of the decision in Norwood *v.* Baker, *supra*, § 383, that the invalidity of the method of assessment adopted did not invalidate the bonds provided for in another section of the same statute, and therefore constituted no defense to the municipality in a suit upon the bonds. The Ohio statute, under which the assessment was made which was held invalid in Norwood *v.* Baker, provided in another section for the issue of township bonds, which were payable from the proceeds of the assessments, as they were paid in five annual installments provided by the statute. The township refused to pay these bonds, setting up among other defenses that the law under which the bonds were issued had been held void by the Supreme Court in Norwood *v.* Baker, and this defense was sustained by the United States Circuit Court. The decision was reversed in an opinion by Justice Harlan, with no dissent. It did not follow, said the court, that, because the

[1] Loeb *v.* Columbia Township Trustees, 179 U. S. 472. In Warner *v.* City of New Orleans, 31 C. C. A. 238, defendant had purchased the drainage system then in process of construction from the contractor, paying therefor in warrants and covenanting to facilitate the application of the drainage assessments to the payment of the warrants. The city abandoned the work, and the State court decided that the assessments

assessment was invalid, in that it precluded inquiry in respect to special benefits, the township could escape liability on the bonds. The power to issue the bonds to raise the money, and the mode in which the township should raise the necessary sums to pay the bonds when due, as well as the interest accruing thereon from time to time, were distinct and separable matters. It was admitted that there was some ground for saying that the legislature would not have passed the act without the section providing for assessment by the frontage rule; but the court thought that this was not so manifestly the case as to justify the refusal to execute the valid part of the statute, when that could be done in harmony with the intention of the legislature to have the improvement in question made by the township, and the cost met by issuing bonds.

It was argued that the bonds were payable only out of the proceeds of the assessment, and on this point the court said, p. 490:—

"The relief asked and the only relief that could be granted in the present action, is a judgment for money. If the township should refuse to satisfy a judgment rendered against it, and if appropriate proceedings are then instituted to compel it to make an assessment to raise money sufficient to pay the bonds, the question will then arise whether the mode prescribed by the third section of the act of 1893 can be legally pursued; and if not, whether the laws of the State do not authorize the adoption of some other mode by which the defendant can be compelled to meet the obligations it assumed under the authority of the legislature of the State. All that we now decide is that, even if the third section of the State statute in question be stricken out as invalid, the petition makes a case entitling the plaintiff to a

were not collectible because the property assessed would not be benefited. On appeal the city was held estopped to deny the validity of the assessments and was liable to account for the fund as if collected.

judgment against the township. Whether a judgment if rendered could be collected, without further legislation, depends upon considerations that need not now be examined."

The enforcement of such a judgment would depend upon the construction of the statute authorizing the issue of the bonds, that is, whether the statute provided that the special assessments alone should be applied to the payment of the bonds, or the bonds were general obligations of the township with a special charge upon the proceeds of the assessments.[1] A judgment upon such bonds has the effect of a judicial determination that the demand of the judgment creditor is valid and what amount is due him, but it gives him no new rights in respect to the means of payment. This would depend, as stated, upon the construction of the statement under which the bonds are issued.

§ 387. Supreme Court in King v. Portland.

In striking contrast with the division of the court in Norwood *v.* Baker and in the subsequent limitation of that case to its "special facts," was the unanimous opinion of the court sustaining the enforcement of a special assessment under the frontage rule in the city of Portland, Oregon. The opinion in this case was delivered by Justice McKenna, who concurred in the opinion in Norwood *v.* Baker, and in the dissent of Justice Harlan in the subsequent limitation of that case to its "special facts."[2]

The charter of Portland provided that the city council

[1] See United States *v.* Ft. Scott, 99 U. S. 152; United States *v.* County of Macon, 99 U. S. 582.

[2] King *v.* Portland, 184 U. S. 61. The official syllabus is significant: "Under the facts of this case and the interpretation given to the charter of the city of Portland by the Supreme Court of the State of Oregon, this court is of opinion that the plaintiffs in error have not been deprived of their property without due process of law."

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work and the entry of the assessment. Ample opportunity was thus afforded the owner to appear and interpose the constitutional objections.

It was strongly urged that the basis of apportionment was itself invalid, in that it made no taxing district but considered each lot by itself, compelling each to bear the burden of the improvement in front of it without reference to any contribution to be made by other property.[1] Accidental circumstances might cause the greater part of the cost to be expended in front of a single lot, although those circumstances might not at all contribute to make the improvement more valuable to the lot thus specially burdened, but perhaps even have the opposite consequence.

But the court replied, page 68: "'If accidental circumstances' may take from the rule the effect of apportionment, they do not prevent the application of the rule to cases where such circumstances do not exist. Where they exist they can be properly dealt with. Presumably the rule of the Portland charter was prescribed by the legislature in view of the conditions which existed in that city and in the expectation that the common council would so exercise its power and judgment in the creation of districts that the cost of the improvement ordered would be apportioned by the application of the rule prescribed. The expectation has been justified by the experience of the city. Under the rule of the charter, the opening and grading of the streets have been done for years, and the courts have been watchful against abuses, — watchful to protect the rights of property owners." [2]

[1] Citing Cooley on Taxation, Section 453.

[2] The opinion in this case cites the opinion in Oregon and Cal. Railroad Co. *v.* Portland, 25 Or. 229. and 22 L. R. A. 713, as illustrative of the point that "accidental circumstances" would warrant the court in protecting the property owner. The court there enjoined the enforcement of an ordinance for a special assessment levied upon the frontage rule to pay for the construction upon a street of an elevated roadway.

§ 388. **Legislative power and special facts.**

It is clearly established by these recent decisions of the Supreme Court that the legislative power, broad and comprehensive as it is in taxation, is not unlimited and is not beyond the reach of judicial review and scrutiny. The rule thus laid down in the case of special assessments is substantially the same which has been declared in regard to the requirement of a public purpose in general taxation or in the enforcement of limitations upon the legislative power of classification. These are primarily legislative questions and the courts, especially the Federal courts, will only in extreme cases review the exercise of that discretion. Thus it is primarily for the legislature to determine whether a tax is levied for a public purpose. But as was seen in the preceding chapter, cases are not wanting in which such legislative declaration or finding has been overruled by the courts. It is primarily a legislative function to determine what is a reasonable classification for taxation, but this determination is subject to judicial review.

In assessments for local improvements, the questions of the necessity for the public improvement and the benefit to the district charged therewith are legislative and not judicial. Thus the legislature may determine that the property drained by a sewer or the property fronting on or contiguous to a street shall pay the expenses of the improvement. But if a municipality under legislative authority should undertake to make property which is not drained by a sewer

It said that the presumption was that the council had done its duty, but that this presumption was overcome by the fact that the rule prescribed in the particular case was so grossly and palpably unjust and oppressive as to show that the proper authority had never determined the case on the principles of taxation. It was proven that the property was so situated it could receive no benefit from the improvement, which had never been used by the public or by the plaintiffs, and, the court found, never would be, so that there was no foundation for the exercise of discretion by the council.

part of a special taxing district to pay for its construction,[1] or, when not located on a street or contiguous thereto, part of a taxing district for its improvement, such action would be a clear abuse of legislative authority.

The same principle applies to the method of apportionment as between different parcels of property included in the taxing district. It is settled in these recent cases that it is within the legislative power to establish a fixed basis of apportionment, such as area or frontage, provided it is first determined in each case by the legislative authority that the method adopted would produce approximate equality and that the resulting benefits would equal the cost apportioned to the several property owners.

This is clearly established by the opinion of the Supreme Court of Oregon, which is quoted in the opinion of the Supreme Court in King *v.* Portland, p. 67, where the court, after describing the roadway and the method of apportionment and showing that the cost of the work was practically uniform throughout, so that the assessment according to frontage was as nearly proportional according to the benefits as could be devised, says: "At least it is not apparent that there is any substantial excess of costs above benefits, nor is there such a disproportionate distribution of the burden as to justify the court in declaring the assessment an arbitrary exaction by the legislature. It is beyond the power of human ingenuity to adopt any plan or mode of

[1] See Sears *v.* Street Commissioners, 173 Mass. 350. It was held in Missouri, Johnson *v.* Duer, 115 Mo. 366, that the fact that part of the land in a sewer district could not be drained by the sewer was not a valid objection to a special assessment to pay for such sewer on the part of persons whose land was drained by it. And in a recent case, Heman *v.* Schulte, 166 Mo. 409, decided January, 1902, it was held that, in a suit on a special tax bill for sewer construction, it was not a valid defense that the property was so situated in the sewer district that it could not connect with the sewer except through intervening property over which it had no control.

assessment that will operate to produce exact uniformity, and all that may be expected is a reasonable approximation to such a standard, and the rule adopted under the charter fulfills the condition as applied to the present controversy. There is no doubt that the property was benefited in excess of the costs and expenses."

And in the same case it was said by the Oregon Supreme Court, after reviewing the decisions of the Supreme Court, including Norwood *v.* Baker: —

"But we are inclined to believe that the better doctrine, deducible from adjudged cases, including those of the Supreme Court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, the cost and relative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners.

§ 389. **Accidental or exceptional circumstances.**

If the rule of apportionment produces approximate equality as between the different parcels of property in the district, the fact that it may work injustice in the case of any one or more parcels in consequence of exceptional or accidental circumstances will not render it invalid, but the rule will be enforced in the cases where it may be applied and where such circumstances do not exist. This was directly decided in the case last cited, where the Supreme Court, after quoting the language of the Oregon court given above, said: "We infer that the plan or method of assessment must have that result of itself. If that result is produced by a particular application of the plan or method, the latter will not be enforced." In other words, in case of the failure in any particular case of the plan which gives approxi-

mate equality in the district, the court may grant relief, as was done in Oregon, etc., R. R. Co. *v.* Portland, *supra*, § 387 note. In the language of the Supreme Court, "where such circumstances exist, they can be properly dealt with." The law on this subject is clearly summarized by the Supreme Court of Oregon, which, after speaking of the presumptive validity of the assessment as quoted above, continues as follows:[1] —

"This must be so, logically and necessarily, in view of the broad latitude accorded the legislature, in its discretion, to prescribe the taxing district and the manner and method of making the assessment within the district, as it concerns individual owners and proprietors. As the writers say, the authority of the legislature in these respects is almost without limit; yet that there is a limit beyond which it cannot go, all will concede. When, however, it has exercised its legislative discretion, and prescribed a district and adopted a method, it ought to be plain and indisputable that it has exceeded its constitutional authority, before the court should undertake to set at naught its declared will. Neither ought the system to be condemned because there may be exceptions wherein it would work a legal injury to enforce it."

§ 390. Requirements of "due process of law."

"Due process of law" therefore in special assessments requires, not necessarily a judicial hearing as to special benefits, but some hearing before some authority on the question, and this opportunity for hearing must be given before the action is taken which makes the assessment binding upon the property, unless, in the enforcement of the assessment by suit, the taxpayer is allowed to contest the question of benefit. The municipal authorities may ap-

[1] King *v.* Portland, 38 Oregon 402, l. c. p. 429.

portion the assessment by a uniform rule such as frontage or area, but this can only be done after determination that the benefits to the property will equal the assessment.

Thus if the statute under which the village authorities proceeded in the case of Norwood *v.* Baker, had provided for notice and hearing before them on the question of benefits, and they had thereupon determined that the benefits to the Baker property from the opening of the street would equal the assessment apportioned thereto, it is difficult to see how the assessment could have been set aside under the rule declared in King *v.* Portland. The ownership by one person of the entire tract through which the street was opened would not of itself affect the validity of the assessment, neither would the fact that the amount assessed included the costs of the condemnation as well as the cost of the land appropriated, if it was determined that the amount of benefit equaled the aggregate cost. The real difficulty in the case was that the procedure was based on the arbitrary assertion that the legislative action was conclusive, regardless of the determination of benefits.

CHAPTER XIV.

DUE PROCESS OF LAW AND THE JURISDICTION OF THE STATES.

§ 391. Tax must be levied upon subjects within jurisdiction of State.
392. Limitation of taxing power by jurisdiction not dependent on Fourteenth Amendment.
393. Jurisdiction of State in taxation of property.
394. State may tax money and securities in its jurisdiction of non-resident owners.
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415. Domicil distinguished from residence and citizenship.
416. Right to change domicil.
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§ 420. Taxation of personal property situated without State of owner's domicil.
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426. Due process of law and double taxation.
427. Double Taxation from competing State authorities.
428. Interstate comity essential to avoid double taxation.
429. Duplicate inheritance taxation.
430. Question one of construction and not of legislative power.
431. Due process of law in taxation requires legislative authority.
432. State construction of legislative authority conclusive.
433. Constitutionality of statutes is for judicial, not executive, determination.

§ 391. Tax must be levied upon subjects within jurisdiction of State.

Due process of law requires, not only that the tax should be for a public purpose, but also that it should be levied upon subjects of taxation which are within the State's lawful jurisdiction. In taxation, as in all judicial proceedings, the power of the State must be exercised within its jurisdiction. It was said by the Supreme Court[1] that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised. "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great

[1] State Tax on Foreign Held Bonds, 15 Wall. 300, l. c. 319.

variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

§ 392. Limitation of taxing power by jurisdiction not dependent on Fourteenth Amendment.

This limitation of the taxing power of the State to its lawful jurisdiction obviously does not depend upon the Fourteenth Amendment. Like the limitation which requires that the tax shall be levied for a public purpose, this also is inherent in the conception of a tax. Prior to the adoption of the Fourteenth Amendment this limitation of the taxing power of the State was enforced by both the State and Federal courts. A tax by a State upon property without its lawful jurisdiction is clearly a taking of property without due process of law, and may also be obnoxious to other provisions of the Constitution of the United States, such as the national control over interstate commerce. It may be a tax upon the property or instrumentalities of the United States, or violative of the privileges and immunities of citizens of other States, or impair the obligation of contracts. But whether such taxes contravene other provisions of the Constitution or not, they are clearly contrary to the requirement of due process of law.

The taxing power of the State may be conveniently treated with reference to three distinct subjects of taxation, enumerated by Justice Field in the opinion just cited, *property*,

business and *persons*. A State tax, to be valid and to constitute due process of law, must be levied upon property; business or persons within its jurisdiction.

§ 393. Jurisdiction of State in taxation of property

There can of course be no question as to the power of the State to tax all real property within its limits. It is also clearly established that all property, movable as well as immovable, actually located within the confines of the State, is subject to its taxing power, except of course property reserved therefrom under the constitutional provisions already considered. The fiction which plays so important a part in other branches of the law, that movable property has its *situs* at the domicil of the owner, has no application to the power of the State to subject all property, movable and immovable, within its limits, to taxation. Movables actually located in the State therefore may be taxed there, though the owner may be domiciled elsewhere. Thus Story says: [1]—

"The general doctrine is not controverted that, although movables are for many purposes to be deemed to have no *situs* except that of the domicile of the owner; yet, this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

This principle of public law has been repeatedly declared by the Supreme Court in relation to the taxing power of the States. In Coe *v.* Errol, [2] it was argued that the logs claimed

[1] Story's Conflict of Laws, 7th Ed., Sec. 550.
[2] 116 U. S. 517.

to be in transit through New Hampshire were taxed to their owners in Maine as part of their general stock in trade. But the court held that this would have no influence on the decision of the question whether they were taxable in New Hampshire, saying, at page 524:—

"We have no difficulty in disposing of the last condition of the question, namely, the fact (if it be a fact) that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by non-residents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary."

§ 394. State may tax money and securities in its jurisdiction of non-resident owners.

Where personal property is located within the State, whatever its form, whether evidences of debt or otherwise, it may be subjected to the State's taxing power, irrespective of the residence of the owner. Thus the State may establish an independent *situs* for taxation of bonds, mortgages and other securities of non-resident owners, located in its jurisdiction.

This principle was applied in a recent case in the Supreme

Court from Louisiana, where it was held [1] that certain notes and mortgages, which had been inherited by a citizen of New York from a citizen of Louisiana, but were in the possession of an agent, in New Orleans, were taxable in Louisiana. The court said that the maxim *mobilia sequuntur personam*, was at best only a legal fiction, and that there had been frequent recognition of the power of a State to separate, for the purposes of taxation, the *situs* of personal property from the domicil of the owner. As to the remark in the State Tax on Foreign Held Bonds Case,[2] that personal property consisting of bonds and mortgages generally has no *situs* independent of the owner, the court said at p. 320: —

"This last sentence, properly construed, is not to be taken as a denial of the power of the legislature to establish an independent situs for bonds and mortgages, when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their situs to be that of the domicile of the owner, a declaration which the legislature has no power to disturb, when in fact they are in his possession."

The court also declared that there was nothing in the case of Kirtland *v.* Hotchkiss,[3] conflicting with these decisions. It was there held that "a State might tax one of its citizens on bonds belonging to him, although such bonds were secured by mortgage on property situated in another State," and it was assumed that the *situs* of such intangible property was at the domicil of the owner, as there was no legislation in that State attempting to set aside that general rule in respect to the matter of *situs*.

It was further said that, while, in the absence of statute, bills and notes are treated as choses in action and are not

[1] New Orleans *v.* Stempel, 175 U. S. 309.

[2] *Infra*, § 399.

[3] *Infra*, § 421.

subject to levy and sale on execution, yet by the statutes of many States they are made so subject to seizure and sale, as any tangible personal property. And the opinion concluded, p. 322: —

"It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay — evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation."

The same principle was applied[1] where the estate of a non-resident of Minnesota, who had loaned to residents of that State large sums upon notes and mortgages, which were in the possession of a resident agent, was held properly chargeable with taxes on these securities.[2]

§ 395. Property in hands of resident agents subject to taxing power.

In the case of New Orleans *v.* Stempel, *supra*, the notes, mortgages and bonds were in the possession of the local administrator. But the principle has been applied in numerous cases where money of non-residents has been placed in the hands of *resident* agents for permanent investment and reinvestment.

Thus it was held in a leading case in Vermont, Catlin *v.* Hull,[3] decided in 1849, that notes, mortgages, etc., in

[1] Bristol *v.* Washington County, 177 U. S. 133.

[2] See also McCutchen *v.* Rice County, 7 Fed. Rep. 558.

[3] 21 Vt. 152.

the hands of a local agent belonging to a non-resident, had a taxable *situs* in that State, the court saying in an opinion by Judge Poland: "We are not only satisfied, that this method of taxation is well founded in principle and upon authority, but we think it entirely just and equitable, that, if persons residing abroad bring their property and invest it in this State, for the purpose of deriving profit from its sudden employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government, which thus protects it." And the court, referring to a qualifying provision of the statute which is notable for its regard to interstate comity in taxation, added: "And as this power of taxation in this State is only to be exercised in cases, where such property is not shown to be taxed to the real owner, where he resides, we think, that there is no reason for saying, that this power has been attempted to be exercised in an unjust spirit, or that its exercise shows any want of proper comity in our State government." [1]

This principle was approved by the Supreme Court, not only in New Orleans *v.* Stempel [2] but also in Bristol *v.* Washington County.[3] In the latter case a citizen of New York had, for many years, kept a sum of money invested in Minnesota, through a local agent. It was held that this investment was subject to taxation in Minnesota and that the amount of the tax was a claim against the property of the owner, which, after his death, could be proved against his estate in that State. The court therefore directed the Circuit Court to enter judg-

[1] More recent judicial utterances in other States do not show this solicitude lest the State be accused of want of "proper comity" in taxation. See Sec. 427 *et seq.*

[2] *Supra*, Sec. 394.

[3] 177 U. S. 133; see also Walker *v.* Jacks, 31 C. C. A. 462.

ment for the amount of the taxes which were unpaid, and which were not barred by the statute of limitations of the State. In its opinion it cites a decision of the Supreme Court of Minnesota, which had held that this property was taxable in the State.[1] The latter court in its opinion said: "Corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its *situs* where it is owned, — at the domicile of the creditor. The creditor, however, may give it a business *situs* elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business."[2]

So clearly established is this right to tax such property at the place of its actual investment and employment, that it was said by the New York Court of Appeals:[3]—

"It is clear from the statutes referred to and the authorities cited and from the understanding of business men in commercial transactions, as well as of jurists and legislators, that mortgages, bonds, bills and notes have for many purposes come to be regarded as property and not as the mere evidences of debts, and that they may thus have a *situs* at the place where they are found like other visible tangible chattels."

[1] In re Jefferson, 35 Minn. 215.

[2] To the same effect are State ex rel. Taylor *v.* St. Louis County Court, 47 Mo. 594; People *v.* Trustees, etc., 48 N. Y. 390; Wilcox *v.* Ellis, 14 Kansas 588; Board of Supervisors *v.* Davenport, 40 Ill. 197. In the last case the decision is apparently placed on the ground that the owner of the property had a business residence in Illinois. But it appears to have been a case of actual employment of the property in the State where taxed, and is therefore clearly in line with the other cases cited.

[3] People ex rel. Jefferson *v.* Smith, 88 N. Y. 576, decided in 1882.

The court held that under the New York statute, which taxed "all lands and all personal estate within" that State, a citizen of New York could not be taxed on money invested in notes and mortgages held by his agents in another State. They said, in reference to the case of Kirtland *v.* Hotchkiss,[1] that, while the State *could* have authorized the taxation of these securities at the domicile of the owner, according to their construction of the statute the legislature did not intend to do so, and that a more accurate statement of the doctrine of that case would be to say that a debt *may* have its *situs* at the residence of the creditor and *may* be there taxed.

§ 396. Jurisdiction for taxation of credits not dependent upon residence of agent or of debtors.

While the presence of a resident agent is of service in enabling the State to exercise its power of taxation, its jurisdiction does not depend upon that fact, but upon the actual situation of the property in the State. It may be difficult to localize the property for taxation where there is no resident agent, but that does not affect the question of the jurisdiction of the State when the locality is fixed.

Thus it was said by the Supreme Court of Indiana,[2] that the test as to where the right to tax property exists is the place of its location and use. If property is held, owned and used in Indiana, it is taxable there, and this is true whether the business in which it is used is conducted by the owner in person or by some one else for him. It is accordingly quite immaterial whether the notes or other obligations subjected to the taxing power of the State have been executed by citizens of the State or non-residents.[3]

[1] § 421.

[2] Buck *v.* Miller, 147 Ind. 586, and 37 L. R. A. 384.

[3] The court said that the contrary contention suggests a most excellent plan by which the holders of this class of property might es-

§ 397. Credits must be localized in jurisdiction for taxation.

The principle therefore established in the construction of State statutes, taxing all property within the scope of their operation, is that the State can tax whatever personal property it can localize within its jurisdiction. In the language of the Supreme Court of Pennsylvania, "there is nothing poetical in tax laws. Wherever they find property they claim a contribution for its protection, without any special respect to the owner or his occupation." Credits owing from citizens of the State to parties outside of it obviously cannot be localized in the State of the debtor, and for this reason they were not included in the tax law of Louisiana, as construed by its Supreme Court in New Orleans *v.* Stempel, *supra*, § 394. It seems that, in order for the debt to be subject to the taxing power of the State, it must be reduced to a concrete form and evidenced in some tangible shape, as in a note or other written obligation, and must be actually in the State in the hands of an agent, or otherwise localized within its confines for permanent, as distinguished from temporary, use.[1]

§ 398. Enforcement of taxes against non-resident owners of property in State.

Taxes are not debts, as they are not created by contracts,

cape taxation altogether. "For example, let those in Ohio convert all their means into bonds, stocks, notes and mortgages issued and executed by residents of Ohio, and let those in Indiana invest likewise in bonds, stocks, notes and mortgages, issued and executed by residents of Indiana; and then let the holders of the Ohio securities move to Indiana, and the holders of the Indiana securities move into Ohio, and it is done. Those wealth-movers must, however, be careful not to bring their domicil along with them. They may, of course, indeed they must, live and do business in the State into which they move; but they should be cautious to have their residence and domicil elsewhere."

[1] As to the power of the State, where the creditor is domiciled therein, to tax credits and other personal property located in other states, see *infra*, § 420 *et seq.*

but are based upon the power of the State to enforce contribution from persons and property within its jurisdiction for the support of its government. The point was raised in the case of Bristol *v.* Washington County, *supra*, § 395,[1] that, as the domicil of the testatrix against whose estate the claim of the State for taxes was proven, and also the domicil of her executor, were in the State of New York, the power to tax could be exercised only against the very property taxed; that the assessments did not constitute judgments *in personam*, and that judgment on these assessments could not therefore be recovered against the ancillary administrator in Minnesota.

The Supreme Court, following the Supreme Court of Minnesota, decided that under the statute of that State for the purpose of proof and payment out of an estate in probate, a personal tax was a debt, though not a debt in the usual acceptation of the term, saying: "the obligation to contribute to the support of government in return for the protection and advantages afforded by government is not dependent on contract, but on the exercise of the public will as demanded by the public welfare." The claims were therefore properly allowed against the estate. The case of Dewey *v.* Des Moines,[2] was distinguished, as there the assessment was levied on real estate for a local improvement without service upon the non-resident or his voluntary appearance or any consent on his part to the jurisdiction.

But in a recent New York case it was held[3] that, while the State had the power to levy a tax upon the personal property of a non-resident, in this case national bank stock in a New York City bank, situated within its boundaries and subject to its jurisdiction, and for that purpose to separate the *situs* of the owner from the actual *situs* of

[1] § 394.
[2] *Supra*, § 360.
[3] City of New York *v.* McLean, 57 App. Div. 601.

the property within the State, and to subject it to taxation because it was within the State limits, yet it could only enforce payment of the tax by virtue of its jurisdiction over the property. It had not therefore by virtue of that jurisdiction any power to subject the non-resident owner of the property to a personal liability for the tax, although nothing appears to indicate that there was not personal service upon the defendant.[1] The court based its decision upon the doctrine of Pennoyer *v.* Neff,[2] and Dewey *v.* Des Moines, *supra*, § 360.

It will be observed that in the Bristol case, *supra*, the State of Minnesota overcame the difficulty of securing service of process in enforcing personal tax claims against a non-resident, through the ancillary administration in Minnesota of the estate of the deceased non-resident owner.

§ 399. Power of State in taxing corporation bondholders through corporation.

The practical difficulty of reaching individual personal property like choses in action, notes and mortgages, for taxation, has led to attempts to reach so much of said property as was represented by bonds of corporations. This was done by compelling all corporations, having offices in the State which issued bonds, to pay the tax on such bonds and deduct the amount from the interest on the bonds paid to the holder. But it was held by the Supreme Court that

[1] Justices Van Brunt and O'Brien dissented, saying: "The right to tax would not be of much value if there were no power to collect. The tax bears the same relation to a non-resident as to a resident, and as a tax is a debt due from a resident and is collectible by suit, it would seem to follow that a tax against a non-resident would be collectible in the same manner when the court can get jurisdiction of the non-resident by the service of process." It was also suggested that a lien could not be enforced against the stock, as the owner had the certificate and could give title to it by transfer through the proper power of attorney.

[2] 95 U. S. 714.

as to *non-resident* bondholders, such taxation was not a legitimate exercise of the taxing power of the State, but an attempt to reach property beyond its jurisdiction, and that the law sought to be enforced was an impairment of the obligation between the corporation and the bondholder.[1] The tax laws could have no extra-territorial operation.

In this case no reference was made to the Fourteenth Amendment. But later,[2] the Fourteenth Amendment was invoked in resisting a statute directing a deduction of the tax from the interest paid by the railroad company to the resident holders of bonds. But the Supreme Court held that as to such resident bondholders, this requirement was within the lawful power of the State.

§ 400. State cannot compel foreign railroad company to act as tax collector.

In another case the State of Pennsylvania endeavored to enforce this tax as to resident holders of the bonds of a New York railroad corporation having its office there, but operating part of its road in Pennsylvania, by compelling the corporation to deduct the tax from the interest paid at its New York office to the holders of its bonds who were residents of Pennsylvania.[3] The court said that, if there was any question as to the deduction of the tax from the

[1] State Tax on Foreign Held Bonds, 15 Wall. 300. Justices Davis, Miller and Hunt dissented, saying that in their opinion the State legislature was not restrained by anything in the Federal Constitution nor by any principle which that court could enforce against the State court, from taxing the property of persons which it could reach and lay its hands on, whether these persons resided within or without the State. See also Railroad Co. *v.* Jackson, 7 Wall. 262; Murray *v.* Charleston, 96 U. S. 448.

[2] Bell's Gap R. R. Co. *v.* Pennsylvania, 134 U. S. 232. See also Commonwealth *v.* Delaware Div. Canal Co., 123 Pa. St. 594, 2 L. R. A. 798.

[3] Erie Railroad Co. *v.* Pennsylvania, 153 U. S. 628.

interest paid to non-resident holders, that is, to bondholders not residents of Pennsylvania, the State tax on Foreign Held Bonds Case would be conclusive against the State. On the other hand, the court distinguished this case from the case last cited, that of Bell's Gap Railroad *v.* Pennsylvania, because that was a Pennsylvania corporation which was compelled to deduct the tax from the interest paid to Pennsylvania holders of its bonds. Decision was rendered against the State on the ground that it had no right to make the New York railroad company its tax collector, that is, to impose upon the company the duty of collecting the State taxes at its office outside of the jurisdiction of the Commonwealth, and that it could not impose such a duty as a condition of permitting the New York railroad company to perform its business as a common carrier within the State of Pennsylvania.

It will be seen that these decisions are applicable only to *bonds* of a railroad company, which are treated as debts having their *situs*, for taxation, at the residence of their holders. The power of the State to make the *mortgage* securing the bonds an interest in the property mortgaged, and taxable as such, was not before the court. It will be observed also that these decisions have no application to the case of corporate *stock* and its liability to taxation by the State of incorporation, irrespective of the residence of the holders.

Public stock, which is the form in which the indebtedness of States and municipalities is sometimes evidenced, when held by parties not domiciled in the State, is not subject to the taxing power of the State. Thus a resident of New York was held not taxable in Maryland on the stock of the city of Baltimore, the court saying that the taxable *situs* of the stock was at the domicil of the owner.[1]

[1] Mayor *v.* Hussey, 67 Md. 112, the court following the Tax on Foreign Held Bonds case, *supra*, and Murray *v.* Charleston, 96 U. S. 432. In

§ 401. State may make mortgage taxable interest in real estate.

In the Tax on Foreign Held Bonds Case, *supra*, § 391, the opinion was expressed that a mortgage, being a mere security for a debt, confers upon its holder no interest in the land, and when held by a non-resident is as much beyond the jurisdiction of the State, as the person of the owner. This declaration was urged against the system, adopted by the State of Oregon, of taxing mortgages as interests in the real estate. According to this system, the mortgage is made a separate interest in the real estate for taxation, and is taxed to the mortgagee while the equity, or the value of the property less the mortgage, is taxed as the interest of the mortgagor. A California corporation owning notes secured by mortgage upon real estate in Oregon filed a bill against the enforcement of a tax, levied, under this statute, on their mortgage-interest on the ground that the tax was, in violation of the Fourteenth Amendment, a taking of property without due process of law. The court, in an opinion by Justice Gray,[1] held that the tax was valid, and, after analyzing the statute and showing that the personal obligation of the mortgagor is not taxed, and that the mortgagor as well as the mortgagee is entitled to have deducted from his own assessment the amount of his indebtedness within the State, said, page 425: —

"The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation.[2] Nor is any such discrimination made be-

this case the tax had been deducted from the interest. The court held that although there was no authority for this action, the owner was estopped by her acquiescence for several years, so that it was in effect a voluntary payment, barring her from recovering it back.

[1] Savings Society *v.* Multnomah County, 169 U. S. 421, Justices Harlan and White dissenting.

[2] The statement in the opinion that there is "no double taxation" in

tween mortgagors and mortgagees, or between resident and non-resident mortgagees, as to deny to the latter the equal protection of the laws. * * *

"The authority of every State to tax all property, real and personal, within its jurisdiction, is unquestionable. McCulloch *v.* Maryland, 4 Wheaton, 316, 429. Personal property as this court has declared again and again, may be taxed, either at the domicil of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the State which imposes the tax. Tappan *v.* Merchants' Bank, 19 Wall. 490, 499; State Railroad Tax Cases, 92 U.S. 575, 607; Coe *v.* Errol, 116 U. S. 517, 524; Pullman's Car Co. *v.* Pennsylvania, 141 U. S. 18, 22, 27. The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in action, to the creditor at his domicile; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its *situs*."

§ 402. Foreign Held Bonds Case in part overruled.

As to the Foreign Held Bonds Case,[1] after stating what was decided, the court said at p. 428: —

"The remarks in the opinion, supported by quotations from opinions of the Supreme Court of Pennsylvania, that a

this taxation of mortgages as real estate obviously applies only to the State of Oregon. There is nothing to prevent the State, where the holder of the mortgage is domiciled, from taxing him upon the mortgage as part of his personal estate. See Kirtland *v.* Hotchkiss, *infra*, § 421.

[1] 15 Wall. 300.

mortgage, being a mere security for the debt, confers upon the holder of the mortgage no interest in the land, and when held by a non-resident is as much beyond the jurisdiction of the State as the person of the owner, went beyond what was required for the decision of the case, and cannot be reconciled with other decisions of this court and of the Supreme Court of Pennsylvania."

After citing opinions of that court and of the State courts as to the interest of a mortgagee, the court declared that the case of Kirtland *v.* Hotchkiss, *infra*, § 421, decided only that debts to persons residing in one State, secured by mortgage of land in another State, might for the purpose of taxation be regarded as situated at the domicil of the creditor, but that the question whether the mortgage could be taxed there only was not involved in the case. The opinion concludes, p. 431:—

"The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage; and, with equal distinctness, provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle and in accordance with the weight of authority, that this interest, like any other interest, legal or equitable, may be taxed to its owner (whether resident or non-resident) in the State where the land is situated, without contravening any provision of the Constitution of the United States."[1]

[1] In Mackay *v.* San Francisco, 113 Cal. 392, this system was sustained; see also Dundee Mortgage Co. *v.* School District No. 1, 19 Fed. Rep. 359, and 21 Fed. Rep. 151.

In Allen *v.* National State Bank, 92 Md. 509 and 52 L. R. A. 760, a

§ 403. State may tax stock of non-resident holders in domestic corporations.

Under the same principle of the right to tax all property which can be localized in the jurisdiction, a State may tax the capital stock of its domestic corporations, either directly to the corporation, or through the corporation to the individual shareholders, irrespective of their residence, whether in or out of the State, the stock having a *situs* for taxation at the domicil of the corporation.[1] This is the principle adopted in the taxation of non-resident shareholders in national banks, taxed by the States under the authority of the Act of Congress,[2] the stock of the non-resident holders having a *situs* for taxation at the domicil of the bank.

In a recent case, a statute of Connecticut allowing to resident stockholders a deduction from the assessment of their stock at its market value on account of the value of the real estate held by the corporation, although no such deduction was allowed the non-resident shareholders, was sustained by the Supreme Court, affirming the judgment of the Supreme Court of Connecticut.[3] The tax was objected

statute taxing mortgages as real estate was sustained, although no provision was made for deducting the amount of the mortgage debt from any assessment upon the mortgagor, as in the Oregon statute. The court said (p. 515) that this omission was "rather an objection to its justice and fairness than to its validity."

In the Southern Pacific Railroad cases, 13 Fed. Rep. 722, and 18 Fed. Rep. 385, the California system was held by Justices Field and Sawyer to be violative of the Fourteenth Amendment, for discrimination in exception of railroad mortgages. For decision of Supreme Court of Missouri holding constitutional amendment in that State introducing the California system void for same reason, see *supra*, § 314.

[1] Street R. R. *v.* Morrow, 87 Tenn. 406; St. Albans *v.* National Car Co., 57 Vt. 68.

[2] Tappan *v.* Merchants' Bank, 19 Wall. 490; "Taxation of National Banks," *supra*, Chapter IX.

[3] Travelers' Ins. Co. *v.* Connecticut, 22 Sup. Ct. Rep. 673, affirming State *v.* Travelers' Insurance Co., 73 Conn. 255.

to on the ground that there was a discrimination between the resident and non-resident stockholders, working a denial of the equal protection of the laws; but the court held that the discrimination was only apparent, as the non-resident stockholder paid no local taxes, but simply contributed so much to the expenses of the State, while the resident stockholders paid no tax to the State but only to the municipality in which they resided.

The State of the residence of the stockholder may tax the same stock as part of his personal property, see § 422, *infra*.

§ 404. Non-resident stockholder not taxable in absence of statute.

But while a State has this power to tax non-resident stockholders in domestic corporations, the existence of such power is not inferred, in the absence of statute specifically subjecting such stocks to taxation, particularly when it would involve double taxation and is inconsistent with the general tax system of the State. This was held in the United States Circuit Court in California [1] in a suit brought against Mr. Mackay after he had removed his domicil from the State, to recover taxes, with interest and penalties aggregating nearly $500,000, assessed against him on account of shares in a number of corporations organized for various purposes. These corporations were organized under the laws of California, and they had their offices in that State, but all or nearly all of their property was in the State of Nevada. The court said that under the laws of California, as construed by the Supreme Court of that State, the taxation of corporate property to the corporation and the shares to the shareholders was double taxation, which was prohibited by the State consti-

[1] San Francisco *v.* Mackay, 21 Fed. Rep. 539.

tution. This case again came up before the United States Circuit Court which held that the *situs* of money and solvent credits for the purposes of taxation, in the absence of statute, is the residence of the owner, and defendant was admitted to be a non-resident of California.[1] As to the public policy which condemned discrimination against foreign stockholders in domestic corporations, the court said: —

"The obvious tendency of discrimination, — double, unequal, and unjust taxation, — is to drive our citizens having a large amount of personal property out of the State to escape that kind of oppression. If, notwithstanding their departure, they can still be taxed upon their incorporeal and intangible property through their stock in domestic corporations, and thereby be taxed on the same property in both States, the next step will be for business men either to withdraw their investments from the State, or change them from *domestic* into *foreign* corporations, as has sometimes been done, and the business will hereafter, to a large extent, be carried on by non-residents in their individual characters, or by foreign corporations over which the State has little control, and the State will be confined for its revenue to the tangible property of such non-residents and foreign corporations found within its borders. A policy that recognizes the principle stated, for the purpose of taxing the stock of resident citizens in foreign corporations, as following the person, but repudiates it for the purpose of taxing the stock of citizens and residents of other States in domestic corporations, thereby imposing upon them the burdens of taxation upon the same property in both States, cannot fail to be inimical to the best interests of the State, and to discourage investments by

[1] San Francisco *v.* Mackay, 22 Fed. Rep. 602. See also State *v.* Thomas, 26 N. J. L. 181, and § 427, *infra*, note 1.

both resident and non-resident capitalists, thereby greatly retarding the future development of its resources. It also places foreign on a better footing than domestic corporations, in violation of the constitution. The principle should be altogether repudiated, or made applicable both ways. I cannot imputé to the legislature an intention to adopt a policy so suicidal as that claimed by the complainant, without provisions of the constitution and statutes, indicating such a purpose, far more specific and unmistakable in their import than any yet brought to my attention."

§ 405. Due process of law in taxation of interstate properties.

The subject of the taxation of interstate carriers has been considered, Chapter VIII, in connection with the regulation of commerce. It was strongly urged in cases there referred to that the rule of assessment enforced by the States of Ohio and Kentucky under the so-called unit rule and mileage apportionment was in effect a taxing of property beyond the jurisdiction of the State, and so a denial of due process of law.[1] The court held however in those cases, against a vigorous dissent, that the valuation of the property as a unit profit-producing plant did not violate any Federal restriction or tax any property beyond the jurisdiction of the State, as the attempt was only to place a just value upon that part of the property which was within the State's confines. It was said however that the company had the right to show that it had property in other states which was included in the total value and which did not properly fall under the taxing power of the State; and the court said that if such facts exist they should be taken into consideration by the State in its proceedings. But if the company

[1] Adams Express Co. *v.* Ohio, *supra*, § 251; Adams Express Co. *v.* Kentucky, *supra*, § 259.

does not make such disclosure, it cannot complain if the State treats all of its property as taxable, that is, on the basis of mileage apportionment. The court added in overruling the motion for rehearing in the Ohio case, page 225: "It is said that the views thus expressed open the door to possibilities of gross injustice to these corporations, through conflicting action of the different States in matters of taxation. That may be so and the courts may be called upon to relieve against such abuses."

The principle is therefore established that while a State can only tax that part of the property and franchises of a railroad, steamboat, telegraph or other interstate corporation which is located within its limits, it can in determining the value of that part consider the value of the entire property in all the States where located as a profit-producing unit. It cannot however determine arbitrarily that the ratio of the mileage in the State to the total mileage is that part of the total value represented by the property within the State. It must consider all the facts which are offered, which tend to show what part of the aggregate value is actually within that jurisdiction. The so-called unit and mileage rules therefore when applied to the valuation of interstate properties, are merely admissible rules to assist in the determination of the value of the property actually employed in the State, see Chapter VIII. It is clear that if the State should refuse to consider such facts, or if for any reason, either in the statute as construed by the State court, or in the enforcement of it by the State tribunal, it should appear that the value of the property outside of the State was included in the assessment, there would be a denial of due process of law. But, if the statute as construed by the State court provides for a consideration of all the facts, and an opportunity is afforded for hearing, an erroneous determination of the effect of the evidence upon the valuation of the property within the

State would not present any Federal question. Indeed, in the absence of fraud or intentional wrong or error, there is grave doubt whether the conclusions of the assessing boards are subject to judicial review in the State court, where there is no statutory provision for review by *certiorari* or otherwise.[1]

§ 406. Due process of law in taxation of corporations.

Corporations are persons within the meaning of the Fourteenth Amendment, and are therefore entitled to due process of law. Their property, whether they are domestic or foreign, can only be taxed like other property of the same class. There is a distinction however between the taxation of property of corporations and that of individuals, which has been already illustrated in the power of

[1] Thus it was held by the Supreme Court of Arkansas, in Wells, Fargo & Co. *v.* Crawford County, 63 Ark. 576, and 37 L. R. A. 371, in applying to the taxation of express companies in that State the unit rule and mileage apportionment, as sustained by the U. S. Supreme Court in the Ohio and Kentucky cases, that the statute directing the board to make the assessment by taking the same proportion of the aggregate value of the capital stock of such express company as the number of miles of railway in the State over which it carried on its business bore to the aggregate number of miles of railway within as well as without the State over which the company did business, was to be construed as restricting the board to this plan of assessing plaintiff's property only in the absence of other evidence. It was the duty of the board to consider all evidence which had come to their knowledge concerning the value of such property within and without the State. If therefore the part of the business outside of the State was done on water-ways, this fact was to be considered. The court must presume that the legislature knew it could not tax property situated outside the limits of the State, and this would involve the presumption that there was no intention to tax such property. Mere error in the finding of the board as to the amount of the assessment was not ground for interference by the courts in the absence of fraud, intentional wrong or error in the method of assessment. The courts are powerless to give relief against the erroneous judgments of assessing bodies, except as they are specially empowered by law to do so.

the State to tax the stock of non-resident holders in domestic corporations. The individual cannot be taxed in the State upon his real estate located in other jurisdictions, but the corporation can be taxed in the State of its incorporation upon the full value of its capital stock, irrespective of whether any part or all of that stock is invested in real estate or other property in other jurisdictions.

This power of the State to tax the corporate capital stock or corporate property is distinct from its power to impose a franchise tax, at discretion, upon the privilege of acting in a corporate capacity within its jurisdiction. The latter power, as applied to foreign corporations, has already been considered.[1]

Some States, notably New York, have adopted the principle of taxing both domestic and foreign corporations upon that part of the corporate stock employed in the State.[2]

The reluctance of the judiciary to infer that the taxing power has been exercised unjustly in the case of foreign corporations, so that property outside the jurisdiction of the State has been taxed through the taxation of the privilege of doing business in the State, is illustrated by the opinion of the Supreme Court of Pennsylvania in a case

[1] See *supra*, Chapter V, where it was shown that while the State cannot tax the property as such of foreign corporations located in other jurisdictions, it can impose a tax upon the privilege of doing business in the State, which will in effect be a tax upon the property in other jurisdictions.

[2] As to the construction of a statute taxing capital employed in the State, see People ex rel. *v.* Campbell, 138 N. Y. 543, and 20 L. R. A. 453. The relator in that case was a New York corporation holding stock in several other corporations, some domestic and some foreign, which it had received in compensation for grants of the right to use certain patents. It was held that so much of the capital of the relator as consisted of stock in the domestic companies, bonds of the foreign companies and patent rights still remaining undisposed of, was, for the purposes of taxation, capital "employed within the State;" but that stock in the foreign companies could not be properly included in that category.

already cited.[1] The court said that it doubted the power of the legislature to tax the entire property and assets, constituting the entire capital stock, of a foreign corporation whose interests compelled it to transact a portion of its business, however small, within the State. Great and far-reaching as is the taxing power of the State, it cannot tax either persons or property not within its jurisdiction. "A foreign corporation has no domicil here, and can have none; hence, it cannot be said to draw to itself the constructive possession of its property located elsewhere." There were a large number of foreign insurance companies doing business under State license in Pennsylvania, some of them having a very large capital. Under the theory of the Commonwealth, she could tax the entire property of such companies wherever it was located. The court said that certainly theretofore a sense of the injustice of this view, or perhaps that courtesy which springs from the comity between the States, had prevented the legislature from asserting a power of so doubtful a character, and that they would not impute such a purpose to it then, in the absence of clearly expressed intent.

§ 407. Jurisdiction in taxation over property of trustees, receivers, etc.

The jurisdiction of the State also extends to property therein in the hands of trustees, receivers and others acting in a fiduciary capacity, irrespective of the residence of the parties beneficially interested in the property.[2]

[1] Commonwealth *v.* Standard Oil Co., 101 Pa. 119, *supra*, § 178.

[2] Baldwin *v.* State, 89 Md. 587; Stephens *v.* Railroad Co., 13 Blatchford, 104; Walters *v.* Railroad Co., 68 Fed. Rep. 1002; Ex parte Chamberlain, 55 Fed. Rep. 704. As to the taxation of trust property, see People *v.* Coleman, 119 N. Y. 137, and 7 L. R. A. 407. In Price *v.* Hunter, 34 Fed. Rep. 355, a tax was held properly levied upon certain mortgages held by a local trust company, because the trustee was domiciled in the State. As to procedure for collection of State taxes on property in possession of receivers appointed by Federal courts, see *infra*, § 541.

A claim of non-residents to distributive shares of property on final settlement did not prevent the taxation of funds in the hands of a receiver of a mutual benefit assessment society organized under the laws of the State [1] as property within its jurisdiction, although the funds had been collected in other States in which the company also did business, and turned over by orders of the courts of those States to the receiver, with the understanding that all holders of certificates in the different States should be ratably paid on final settlement.

§ 408. State's jurisdiction over property for taxing purposes summarized.

The State can therefore tax all property, real and personal, which can be localized within its jurisdiction, including money, bank notes and evidences of debt, such as municipal securities, notes and mortgages, found in the State or in the possession of residents of the State, in the hands of the owners or their agents or bailees, whether the owner is domiciled in the State or not; also the capital stock of domestic corporations, irrespective of the residence of the stockholders and the locality of the property represented by such stock. It may tax the property located in its jurisdiction of all foreign corporations, including those doing business therein either under authority of Congress or through the comity of the State, regardless of the fact that such corporations are taxable upon their capital representing such property by the State of their incorporation, and irrespective of the taxation in their own States of the non-resident stockholders of such corporations. The State may also, for the purposes of taxation, treat mortgages on realty located in the State as interests in the realty mortgaged, whether the owners of such realty reside in the State or not.

[1] Schmidt v. Failey, 148 Ind. 150, and 37 L. R. A. 442.

This comprehensive power of taxation over property found within its jurisdiction is within the broad domain of legislative power growing out of the sovereignty of the State; and, except as restrained by the Constitution of the United States, the State may select one or more of these subjects of taxation within its jurisdiction in its own discretion. It will be seen however that there is a distinction between property subject to the exercise of the taxing power, and property subjected to taxation by the lawful exercise of that power.[1]

§ 409. Taxation of business in State.

The jurisdiction of the State extends not only to property located or employed within its territory, but also to all business carried on and occupations and professions practiced therein. The power to tax property employed in any business conducted in the State, whether by individuals, partnerships or corporations, has been already considered. But the power of the State is not confined to imposing a tax on such property. It can tax also the conduct of business itself in any of its infinite forms, that is, the right or privilege of engaging in and carrying on business, professions, manufactures, trades or transportation within its limits, whether by individuals, partnerships or corporations, residents or non-residents. This comprehensive power of taxation may be exercised by the State in its discretion, subject only to the restraints of its own constitution.

Such taxes are sometimes called by the generic name of "business" or "occupation" taxes. The term "license" may be contrasted with "tax," in that a license is required under the police power for regulation, its issue being a condition precedent to the right to carry on a business, while, if the fee charged for the license is greater than the

[1] *Infra*, Sec. 431.

expense involved in the issue and the necessary expense of regulation, its exaction constitutes an exercise of the power of taxation. In this sense therefore a license may exist without the imposition of a tax, and a tax may be imposed without the granting of a license. But as business, occupation or privilege taxes are usually collected through the issue of licenses, which are made conditions precedent of the right to carry on the business or occupation or to exercise the privilege, they are in effect licenses, and are commonly so termed.[1] It is in view of this distinction between a license in the stricter sense and a tax, that the power is conferred in municipal charters to "license, tax or regulate."

The power of the State to tax foreign corporations for the privilege of doing business in its jurisdiction, irrespective of its right to tax the capital employed therein, has been already considered.[2]

A partnership, whether composed of non-residents or not, if it has a local office or place of business, and so does business in the State, is clearly subject to its taxing power, not only as to the assets employed by it in the State in such business, but also as to the privilege of conducting the business therein. Where the business of the partnership is thus localized in the State, and it enjoys the protection of the State's laws, it is obviously immaterial to the taxing jurisdiction of the State where the owners of the business are domiciled. The tax may be upon the assets employed in the business or upon the privilege of conducting the business in the State.[3]

The right to tax in such cases rests not upon the domicil of the partnership or person, as in ordinary personal property taxation, hereafter considered, but upon the fact

[1] See License Tax Cases, 5 Wall. 462.

[2] See *supra*, Chapter V.

[3] Hopkins v. Baker Bros. & Co., 78 Md. 363, 22 L. R. A. 477.

that property is invested and business transacted in the State.

§ 410. License tax on emigrant agent sustained.

The comprehensive power of the State to tax employments is illustrated by the recent decision of the Supreme Court, sustaining a license tax imposed by the State of Georgia upon each emigrant agent or employer or employee of such agent doing business in that jurisdiction.[1] It was urged that this was violative of the Fourteenth Amendment and impaired the right of free egress from the State. The court held however that it was a valid tax upon the occupation, that its purpose, connected as it was with the licenses upon other occupations, was altogether to gain revenue, and that no intention to prohibit the particular business could be imputed. The licenses only affected incidentally and remotely the volume of travel from the State or the freedom of contract.[2]

§ 411. Taxation and regulation under police power.

The power of taxation in the licensing of employments is closely allied to the police power of regulation. A license may be imposed for the purpose of regulating an employment as a police measure for the public safety and

[1] Williams *v.* Fears, 179 U. S. 270.

[2] In Fraser *v.* McConway, 82 Fed. Rep. 257, a tax levied by the State of Pennsylvania upon employers of foreign, unnaturalized males, authorizing a deduction of the amount of the tax from the wages of the employees, was held invalid as violative of the Fourteenth Amendment. In Joseph *v.* Randolph, 71 Ala. 499, a license tax of $250 exacted by the State of Alabama from all emigrant agents, who should contract in certain designated counties with laborers to remove them from the State, was held void as an indirect tax upon the citizen's right of free egress, operating to hinder his personal liberty, and therefore contrary to both the State and Federal constitutions. The court said that it was not a tax upon the right of hiring laborers, but its purpose was to prevent a free egress of laborers from the counties designated in the act.

also as a means of revenue. Thus the liquor traffic may be prohibited altogether by a State, or permitted under such regulations by way of licenses as the legislative power deems proper.[1] As the legislature has the power to prohibit absolutely the sale of intoxicating liquors, it follows that it may impose any conditions or restraints upon the traffic which fall short of absolute prohibition, and these conditions and restraints may take the form of a license-fee exacted as compensation to the public.[2]

There is no necessary connection between a license and a tax upon the right to engage in a business. The former confers a privilege, the latter is levied for the exercise of a privilege. But both taxation and regulation may be effected in the form of a license by the same statute. This right to tax and regulate occupations for purposes of revenue and under the police power may be delegated by the State to municipalities, and the latter can then exercise such power without violation of due process of law.

§ 412. The Chicago Cigarette Ordinance sustained.

This was illustrated in the recent decision of the Supreme Court[3] sustaining an ordinance of the city of Chicago, which prohibited the sale of cigarettes except under a license costing one hundred dollars. The court said at page 188: —

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their de-

[1] Bartemeyer *v.* Iowa, 18 Wall. 129; Beer Co. *v.* Massachusetts, 97 U. S. 25; Mugler *v.* Kansas, 123 U. S. 623.

[2] State *v.* Bixman, 162 Mo. 1.

[3] Gundling *v.* Chicago, 177 U. S. 183.

termination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are necessarily, and in a manner wholly arbitrarily, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

The court held also that it was not a Federal question whether there was a delegation of power by the common council to the mayor, and the opinion concluded, p. 189: —

"It is not a valid objection to the ordinance that it partakes of both the character of regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfills the two functions, one a regulating and the other a revenue function. So long as the State law authorizes both regulation and taxation, it is enough, and the enforcement of the of the ordinance violates no provision of the Federal Constitution."

It was not a Federal question whether the city was authorized by the State law to require the license fee. In that matter the decision of the Supreme Court of the State was conclusive. The Federal question, arising under the Fourteenth Amendment, was whether the State could authorize the passage of the ordinance.

§ 413. Limitations of power to impose license taxes.

But this power of the State to impose license taxes upon occupations must be exercised subject to the prohibitions already considered against interference with interstate or foreign commerce. The State cannot tax the business of

conducting interstate commerce as such, nor the soliciting of orders through sales by samples or otherwise, nor can it discriminate through business or occupation taxes against the manufacturers of other States.[1]

Although the State may license occupations, it is not relieved from the restraints of the Federal Constitution in the taxation of the property employed in such occupations. This, like any other property, is entitled to due process of law and the equal protection of the laws in taxation as in any other exercise of State powers.

§ 414. **Jurisdiction over persons for taxation.**

While the State, in the exercise of the power of taxation, may disregard the fiction that personal property has its *situs* at the residence of the owner, and may tax all property which it can find located within its jurisdiction, it may also through its power over persons within its jurisdiction, subject credits and other personal property owned by them to taxation, though such property may be located in another State, and, in the case of credits, owed by debtors residing in other States and secured by property situated there.

But the taxing power of the State over persons obviously depends upon the domicil of the person, as domicil is the test of liability for purely personal taxes.[2] Domicil, or habitation, in the quaint language of the Massachusetts constitution, is "where a man dwelleth and hath his home."

Justice Story says:[3] "By the term 'domicil,' in its ordinary acceptation, is meant the place where a person lives or has his home. In this sense the place where a person has his actual residence, inhabitancy, or commorancy, is sometimes called his domicile. In a strict and legal sense that is properly the domicile of a person where

[1] *Supra*, Chapters III to VI.

[2] Dicey on Conflict of Laws, Am. Ed., 171.

[3] Conflict of Laws, 7th Ed., § 41.

he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*)." Fact and intent therefore must concur to constitute a domicil.

It was said by the Supreme Court of Massachusetts, by Chief Justice Shaw:[1] "No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim, that every man must have a domicil somewhere; and also that he can have but one. Of course it follows, that his existing domicil continues until he acquires another; and *vice versa*, by acquiring a new domicil, he relinquishes his former one."

It follows therefore that the term "resident" or "inhabitant" in State taxing laws must be construed as meaning one who has his domicil in the State. A man may have several residences, but he can have only one domicil. Where it is located, he may be taxed upon his personal property and his credits, wherever that property or the property securing such credits may be located. But obviously this tax dependent for its validity on jurisdiction over the domicil, can be imposed in but one place, as the tax-payer can have but one domicil, although, as we have seen, the State having jurisdiction over the property, also may tax it. The Supreme Court of Massachusetts said in construing the word "habitancy" as meaning domicil:[2]

[1] Thorndike *v.* City of Boston, 1 Metcalf 242, 245.

[2] Borland *v.* Boston, 132 Mass. 89. In this case Borland left Boston with his family in 1876 for Europe, to remain there an indefinite time, with intent to make some other place his home on his return, and while in Europe, before May 1st, 1877, had selected another city in another State as his future home, but remained abroad, without actually going to his new home, until 1879. It was held that his domicil in Boston for taxation still continued on May 1, 1877, no

"We think, however, that the sounder and wiser rule is to make taxation dependent upon domicile. Perhaps the most important reason for the rule is that it makes the standard certain. Another reason is that it is according to the views and traditions of the people."

Thus in New Jersey a poll tax levied upon "inhabitants" was declared to be properly levied only upon those who were domiciled in the State, as the term "inhabitants" implied more than mere residents.[1]

§ 415. Domicil distinguished from residence and citizenship.

The *domicil*, which is the basis of personal taxation, that is, taxation through the person, is to be distinguished from *citizenship* on the one hand and *residence* on the other. A resident alien, who never by naturalization, assumes the obligations of citizenship or disavows his allegiance to his native country, may acquire a domicil, and so subject his person to the taxing power of the State. He cannot be compelled to perform the duties of citizenship, but he can be compelled to contribute to the support of the State under whose protection he lives, earns his livelihood and enjoys his property.

On the other hand, the domicil is distinguished from residence. One may be taxed at his domicil, though at the time it is levied he is actually residing in another State or a foreign country. A person, who in contemplation of law has a domicil, may, nevertheless, as a matter of fact, be a mere wanderer and not an inhabitant or resident of any place.[2] In the legal sense every one must have a

new domicil having been acquired. This principle has been followed in other cases. See Kellogg *v.* Winnebago County, 42 Wisc. 97; Church *v.* Rowell, 49 Me. 367.

[1] State *v.* Ross, 23 N. J. L. (3 Zab.) 517.

[2] Holmes *v.* Oregon & Cal. Ry. Co., 5 Fed. Rep. 523.

domicil, which, once fixed, continues until a new one is acquired, *facto et nomine*.[1]

§ 416. Right to change domicil.

It is a fundamental rule that the domicil of an independent person is dependent upon choice, that is, it is that place which he in fact and in intent makes his domicil. The right to make a domicil different from that originally acquired involves the right to make other changes, and the removal may, of course, be made from one place to another in the same State, or to another State or country. Whether, in fact, one claiming to have effected a change, has done so is a question of evidence, and the burden of proof is upon him.[2]

§ 417. Motive in change of domicil immaterial.

It is also clearly immaterial what was the motive of the party in making the change, if it has actually been made. Thus a man may change his domicil from his city residence to one in the country or suburbs, in order to escape the burden of what he deems oppressive personal taxation. This he has a right to do. Thus it was said by the Supreme Court of Massachusetts:[3] "It is well settled that a man may change his habitancy or domicil from one town to another, merely because he wishes to diminish the amount of his taxes. If he really intends to change his residence, and does change it, the motive which prompts him to do so is not material."

The same principle obviously applies as that announced

[1] Story on Conflict of Laws, 7th Ed., § 44.

[2] Mitchell *v.* United States, 21 Wallace 350; Desmare *v.* United States, 93 U. S. 605. See also Dicey on Conflict of Laws, Am. Ed., p. 131. The rule stated is of course qualified in cases of persons under disabilities and those having official residences.

[3] Draper *v.* Hatfield, 124 Mass. 53.

by the Supreme Court in cases where it was claimed that a man had changed his residence for the purpose of affecting the jurisdiction of the Federal Court. The sole question is whether the change was made in good faith, that is, was actually made. [1]

§ 418. **Term residence employed in sense of domicil.**

The principle controlling the determination of the question of change of domicil was illustrated in a case in the United States Circuit Court of Minnesota.[2] Suit was brought to recover back personal property taxes paid under protest, on the ground that the plaintiff had already changed his residence, that is, his domicil, when the taxes were levied. The plaintiff, an unmarried man, had been engaged in business in a city of Minnesota, and being out of health, determined to wind up his affairs and move to New York where he intended to make his permanent home. He left Minnesota in April, 1876, and on the day of the annual assessment, May 1st, he was *in itinere* at Philadelphia. The court held that on the latter date he was still a resident of Minnesota, as he had not, in fact, acquired a new residence, and he was therefore properly taxed as the owner of the personalty. The word "resident" in this case is clearly used in the sense of one domiciled; as the plaintiff, under the facts, had obviously changed his residence, but had not yet changed his domicil.[3]

§ 419. **Due process of law and taxation at domicil.**

Due process of law limits that personal taxation, which

[1] Railway Company *v.* Ohle, 117 U. S. 123.

[2] McCutchen *v.* Rice County, 7 Fed. Rep. 558.

[3] That the term "resident" in the taxing laws is used as the equivalent of "one domiciled," see Eidman *v.* Martinez, 184 U. S. 578, where the court distinguishes between the law of the *situs* and the law of the domicil.

rests solely upon the State's jurisdiction over the person, to the place where that person is domiciled. No one, whether citizen or alien, can be taxed through the State's jurisdiction over his person except at the place of his domicil.

If a man has more than one residence, as not infrequently happens, a country and a city residence, for example, located in the same or different States, one of these, and only one, is his domicil, and which one is his domicil must be determined from all the facts. As a rule it is that place which he himself selects. No Federal question is involved in the decision, in good faith, of this question as to which of two residences is a man's domicil, or whether he has changed his domicil. But on the other hand, if the State asserts the right to tax by virtue of residence, irrespective of domicil, the jurisdictional question would be raised; provided, of course, there is no basis for the tax by reason of the presence of the property within the jurisdiction.

Thus in a New Jersey case already cited[1] a person domiciled in Georgia, but having a summer residence in New Jersey, which he occupied with his family for several months in the year, was held not subject in New Jersey to a poll tax levied upon the "inhabitants" of the State, nor was he taxable there upon his bonds or other securities. He was taxable however upon his real estate and his chattels, permanently used or kept in New Jersey, under a statute providing that all lands and personal effects in the State must be taxed. The court said that it was perfectly immaterial for purposes of taxation, whether he made his temporary residence in his own dwelling with his domestics and retinue about him, or as a mere lodger in the house of another.

[1] See § 414, *supra*.

§ 420. Taxation of personal property situated without the State of owner's domicil.

The taxation of personal property according to its actual *situs* is so clearly established in the different States, that practically no attempt is made to assert the right to tax tangible personal property, such as merchandise, live stock, furniture, etc., at the domicil of the owner, when the property is not located within the State. The State statutes providing for the taxation of property "within the State" have been construed as meaning property actually situated therein. Thus it was held in New York that an assessment of a citizen or one domiciled in that State, upon capital invested in business in New Orleans, and farm stock and household furniture in New Jersey, was erroneous under a statute which provided that "all lands and all personal estate within this State * * * shall be liable to taxation."[1] The court based its opinion upon the language and purpose of the statute, and intimated that the legislature could have taxed the property, but had not done so. In other words the question was one of construction, and not of power.

The Supreme Court of Missouri, construing the law of that State, in an opinion notable for its recognition of the principle of interstate comity in taxation, commented upon the injustice of taxing property in the State of the owner's domicil, which is properly taxable elsewhere; and suggested that the rule of taxing at the actual *situs* could not operate unjustly to Missouri, as the property of foreign capitalists in the State more than equaled the property belonging to persons domiciled within its jurisdiction located outside of the State.[2] The court held that municipal bonds of a citi-

[1] People ex rel. Hoyt *v.* Commissioners of Taxes, 23 N. Y. 224.

[2] State ex rel. *v.* County Court, 69 Mo. 454, followed in Valle *v.* Ziegler, 84 Mo. 214. That the opinion of legislators, in the matter of interstate comity in taxation, does not keep pace with judicial opinion, is illustrated by the fact that the General Assembly of Missouri, after

zen of Missouri deposited with a safe deposit company in New York, were not taxable in Missouri.

It was held in the United States Circuit Court for Massachusetts,[1] by Justice Gray, that under the statutes of Massachusetts the property of a deceased inhabitant of that State, after the appointment of an executor and before distribution, was not taxable in the State, where the property was not in the State and neither the executor nor any person having an interest in the property was domiciled therein. The court expressed a doubt whether it was within the constitutional power of the State to impose such a tax.

§ 421. Taxation of citizen at domicil on mortgages in other States.

The comprehensive power of the State to tax the personal property of its citizens was pointedly illustrated in Kirtland *v.* Hotchkiss,[2] where the court held that a citizen of Connecticut was properly assessed for taxation in Connecticut on bonds, owned by him, which were executed in Chicago and secured by a mortgage upon Chicago property. These bonds were assessed as part of his personal property. The court said: —

"It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Consti-

this decision, passed an act, Session Acts of 1881, p. 177, which is still on the statute books of the State, R. S. 1899, § 9121, specifically subjecting to taxation in the State personalty situated in other States, so that all notes, bonds or other evidences of debt held in any State or Territory other than that in which the owner resides, are made taxable, that is, the owner is required to return them for taxation.

[1] Dallinger *v.* Rapello, 14 Fed. Rep. 32. See also 15 Fed. Rep. 434.

[2] 100 U. S. 491.

tution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive or onerous." And it added: —

"The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

"That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicil of the creditor. It is none the less property, because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt,—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and as held in State Tax on Foreign-Held Bonds (*supra*), the right of the creditor to proceed against the property mortgaged, upon a 'given contingency, to enforce by its sale the payment of his demands * * * has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein,' etc. The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of

taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the Federal government, for the reason, too obvious to require argument in its support, that such taxation violates no principle of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exercise by Congress of the power to regulate commerce among the several States. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty, or property without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

"Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal Government cannot rightly interfere."[1]

§ 422. State may tax resident stockholder in foreign corporation upon value of stock.

While a State has the power to tax all shares of stock in corporations of its own creation, *supra*, § 403, the State where the stockholder resides may also require him to list the same stock as part of his personal property. Personal property may acquire an independent *situs* for tax-

[1] For an interesting and vigorous discussion of this case from an economic point of view, see David A. Wells' "Theory and Practice of Taxation," p. 492 *et seq.* For application of the rule established in this case to Federal taxation, see *infra*, § 514.

ation in the jurisdiction where actually located, but this does not affect the jurisdiction of the State to tax the same property through the person of its owner. Thus, in a recent case in Michigan,[1] the court said that the question whether the capital stock of a foreign corporation is taxed in the State of the corporation's domicil is immaterial, since the shares of such capital stock in the hands of residents acquired a *situs* in Michigan for the purposes of taxation, and the law was not framed with reference to what other States might do. It was said by the Supreme Court of Ohio:[2]—

"The constitutional power to tax shares of stock, owned by our citizens in corporations located without the State, does not depend on whether the capital of the corporation is or is not taxed in the State where the corporation is created. The power is the same, whether the capital of the corporation is there taxed or not; otherwise, the power of taxation conferred by the Constitution would be made to depend upon the operation of laws of foreign jurisdictions — a proposition so obviously ill founded that the moment it is stated its falsity becomes apparent."[3]

The same ruling was made in Rhode Island, where stock in a manufacturing company of Massachusetts, which was taxed at the domicil of the corporation, was held taxable at the domicil of the owner in Rhode Island, the court saying:[4] —

[1] Bacon *v.* Board of State Tax Commissioners, 85 N. W. Rep. 307.

[2] Bradley *v.* Bauder, 36 Ohio St. 28; see also Lee *v.* Sturges, 46 Ohio 153 and 2 L. R A. 556.

[3] Citing Dwight *v.* Mayor, etc., 12 Allen (Mass.) 316.

[4] Dyer *v.* Osborne, 11 R. I. 321. The same ruling was made in Missouri, Ogden *v.* City of St. Joseph, 90 Mo. 522, where the court construed the statute taxing property as including shares of stock in a foreign corporation. See also Seward *v.* City of Rising Sun, 79 Ind. 351; Bacon *v.* Tax Commissioners (Mich.), 85 N. W. Rep. 307; McKeen *v.* County of Northampton, 49 Pa. St. 519.

"The laws of Rhode Island are paramount in Rhode Island, and all the inhabitants of the State are subject to them without regard to the laws of any other State. If there be any ground upon which the defendant is entitled to exoneration because of the Massachusetts tax, it is that clause of our Constitution which declares that 'the burdens of the State ought to be fairly distributed among its citizens;' and upon the claim that it is *unfair* to tax him in Rhode Island for property on which he has paid a tax in Massachusetts. We do not think, however, that the tax ought to be declared void under that clause of the constitution. It would certainly be going too far to hold that a man of wealth, living in Rhode Island, cannot be taxed at all in Rhode Island, if his property is all invested in the stocks of a manufacturing corporation of another State, and there subject to taxation. And if such a man can be taxed at all in Rhode Island, the question of how much, is, within reasonable limits at least, a legislative, not a judicial question."

The Ohio statute referred to above was also construed and enforced by the Supreme Court in a case from the United States Circuit Court in Ohio[1] where the court followed the decision of the Supreme Court of that State, above quoted, and held that an assessment under the statute upon a citizen of Ohio on stock of the Western Union Telegraph Company, a non-resident corporation, was valid, although the corporation paid taxes in Ohio on its property in that State. It was necessary for the complainant to show that his stock was exempted under the laws of Ohio. The court followed the State court in saying that the exemption in the statute only applied to shares of corporations which were required to return substantially all their capital and property in the State for taxation,

[1] Sturges *v.* Carter, 114 U. S. 511.

and, as the property of the Western Union assessed in the State was but a small part of all its property, therefore the defendant was not entitled to the exemption of his stock. No Federal question, apparently, was raised in this case, the whole controversy turning upon the construction of the Ohio statute.

§ 423. No immunity under Federal Constitution of State securities from taxation in other States.

The State of Maryland included in the tax list of a resident of Baltimore certain securities of the registered public debt of the State and city of New York and other States, some of which were exempt from taxation in the State where issued and some actually taxed there. It was argued that the same property could not have at the same time more than one *situs* for taxation, and that the *situs* of this was in the State owing the debt. But the court held[1] that it was immaterial whether the debt was taxed in the debtor State or not, and that there was no immunity from taxation in Maryland under Article IV, Section 1 of the Constitution, providing that full faith should be given in each State to the public acts of every other State. No State can legislate with reference to taxation in other jurisdictions or exempt from taxation property beyond its confines. The debt still remained a chose in action with all the incidents which appertain to that species of property. The court said at page 595: —

"It is true, if a State could protect its securities from taxation everywhere, it might succeed in borrowing money at reduced interest; but, inasmuch as it cannot secure such exemption outside of its own jurisdiction, it is compelled to go into the market as a borrower, subject to the same disabilities in this particular as individuals. While the

[1] Bonaparte v. Tax Court, 104 U. S 592.

Constitution of the United States might have been so framed as to afford relief against such a disability, it has not been, and the States are left free to extend the comity which is sought, or not, as they please.

"Taxation of the debt within the debtor State does not change the legal *situs* of the debt for any other purpose than that of the tax which is imposed. Neither does exemption from taxation."

§ 424. Domicil and location, as situs for taxation, in same States.

The question of the *situs* for taxation of intangible personal property, such as bonds, notes, credits, etc., has been frequently presented to the State courts, not only with reference to the taxability of the property within the State, but also as to the place of taxation therein, where the owner is domiciled in one place and the property is localized elsewhere in the same State, *e. g.*, securities in the hands of a local agent or the like. The taxable *situs* of such property may be and usually is regulated by statute of the State, but in the absence of express statute, personal property in the same State is usually held to be taxable at the domicil of the owner.[1] The Supreme Court of Alabama arrived at the same conclusion,[2] in deciding a

[1] The New York Court of Appeals, construing the statute of that State and holding that the residence of the owner and not that of the agent, both of which were in New York, was the taxable *situs* of securities, said: "A person living in a city where taxation was onerous, would escape the burden by placing his assets in the hands of an agent in an outlying town, while the countryman whose property might, at the time of the assessment, be in the hands of his factor, broker or commission agent for use or investment would find it enlarged by city valuations, only to be diminished by taxes from which he could derive no benefit." Boardman *v.* County Supervisors, 85 N. Y. 359, p. 363.

[2] Boyd *v.* Selma, 16 L. R. A. 729, l. c. page 732. This case contains a review of the authorities supporting the view that such property should be taxed at the domicil of the creditor.

case where the domicil and the property were in different cities of the State, saying: —

"Passing to the question whether negotiable promissory notes are taxable at the domicil of the owner, or whether the *situs* of such property, and not the domicil of the owner, determines the liability to taxation, we find irreconcilable confusion in the adjudicated cases, as well as differences in the statement of the doctrine in the text-books. Much of this confusion results from a failure to observe the varying phraseology of the different statutes giving rise to the decisions, but in some instances the authorities differ in the statement of the general principle involved."

§ 425. Double taxation not presumed.

While it is not practicable to formulate a rule, where the cases depend upon the construction of different State statutes and involve their phraseology, both as to what shall constitute taxable property in the State and as to the place in the State where the personalty shall be assessed, it has been frequently held that where bonds, notes and mortgages have had an independent *situs* given them in another State and have been localized there through a resident agent, or otherwise, so as to become subject to the taxing power of that State, they were not subject to taxation in the State of the domicil, unless expressly made so by statute. In other words, it is a rule of construction, repeatedly recognized by the courts in taxation cases, that double taxation will not be presumed to have been intended, and will only be enforced under express mandate.[1] This is only mentioned as illustrative of the complications attending the attempt to reach this class of property, that is, notes, bonds and mortgages, for assessment. Though often liable to

[1] See *supra*, § 402, § 405.

double taxation by the conflicting sovereign claims of the State of domicil and the State of location, a fact to which we find frequent reference in the decisions of the court, such property is rarely reached for taxation in any jurisdiction. These decisions are based upon statutory construction and no principle of due process of law is involved therein.[1]

It has already been shown that a State may tax the shares of non-resident stockholders in its domestic corporations, enforcing payment through its control over the company; and may also tax the resident stockholders in foreign corporations upon the value of the stock held by them, regardless of the fact that the capital of the company or the property in which it is invested is taxed in other jurisdictions.

§ 426. Due process of law and double taxation.

Double or duplicate taxation may be enforced by a State or may result from the operation of the tax laws of a State

[1] Thus corporate shares of domestic corporations are as a rule held not taxable where the corporate property is taxed to the corporation, this being an obvious form of double taxation, which the courts say is not presumed. Thus in Lewiston Water & Power Co. *v.* Asotin Co., 24 Wash. 371, the court said that such double taxation was illegal in the absence of special legislative authorization, although double taxation was not expressly prohibited by the Constitution. See also to the same effect, People ex rel. *v.* Badlam, 57 Cal. 594.

In Citizens' Street Ry. Co. *v.* Common Council, 125 Mich. 673, the court held, although there was no express constitutional prohibition against double taxation, that an act for assessing corporate property by deducting the value of real estate from the market value of the stock, and the indebtedness from the cash value of the personal property, and assessing as personalty the balance so found, was void. The court said that this would be double taxation, because if the company had no debts or real estate, all of the property would be taxed twice as personal estate. In People *v.* Coleman, 135 N. Y. 231, the court in speaking of double taxation, said: "If that had been attempted, some way would have been found to defeat it, as that would be against public policy, the purpose of

without violating the constitutional guaranty of due process of law. It has been repeatedly recognized that duplicate taxation, to a certain extent, cannot be avoided in State tax systems. Thus may be taxed both property and the money that is paid for the property; land and the mortgage upon the land; property and the income from the property; the capital invested in a business and the privilege of conducting the business; capital stock of a corporation, the property in which the capital is invested, and the shares in the hands of the holders. Some of these cases of double taxation are usually avoided by statute or custom. Thus the holders of shares of stock and the capital stock in domestic corporations are usually exempted from taxation, where the corporate property is taxed.[1] In some States mortgages are not taxed where the property mortgaged is taxed. But assuming that there is no discrimination as between taxpayers in the same class, the power of the State to tax twice is said to be the same as the power to tax once, that is, no constitutional question is raised by the exercise of that power. Double taxation does not necessarily consist in assessing the same property twice to the same person, but may consist in requiring a double contribution to the same tax on account of the same property, though the assessments are to different persons.[2]

§ 427. Double taxation from competing State authorities.

While some forms of double taxation, particularly in the case of corporations, are avoided where the taxes are levied

the laws and natural justice." See also State v. Thomas, 26 N. J. L. 181. But see *contra* as to double taxation of corporate property and stock, City of Memphis v. Ensley, 6 Baxter (Tenn.) 553.

[1] See cases *supra*, § 425.

[2] Germania Trust Co. v. San Francisco, 128 Cal. 589; see also Estate of Fair, 128 Cal. 607.

in the same State, there is another form of double taxation, already referred to, which results from the subjection of the same property to the taxing power of two jurisdictions, as in the case where the owner of property is domiciled in one State, and the property located in another; or where the paper evidence of property is in one State and the property itself in another. This is illustrated in the California cases cited, double taxation being prohibited in that State. While railroad mortgage bonds, secured by property in California, were exempt from taxation, similar bonds of a railroad corporation, secured by property in another State, which property was presumably there taxed, were held taxable in California.

It was said by one of our most eminent economic authorities on taxation: [1]—

"It need not be pointed out, that amid the complexities of modern industrial life equality of taxation cannot be attained without a careful consideration of these problems. To-day a man may live in one State, may own property in a second and may carry on business in a third. He may die in one place and leave all his property in another. He may spend all his income in one town and may derive that income from property or business in another town. He may carry on business in several States, or if he has invested in corporate securities, the corporation may be the creature of another State, and be situated or do business in a third. All these cases may affect foreign States or separate commonwealths of the same Federal State, or separate cities or counties of the same commonwealth. The possible entanglements are well-nigh innumerable."

§ 428. Interstate comity essential to avoid double taxation.

These problems however must find their solution in the

[1] Seligman's Essays on Taxation, p. 107.

elevation of public opinion bringing about a recognition of interstate comity in taxation for which the courts have frequently appealed, but which they are powerless to effect.

The Supreme Court has said, by Justice Miller,[1] that they knew of no provision of the Federal Constitution which forbids a State from taxing the same property twice for the same purpose. It seems that the States can be restrained from avowedly taxing property beyond their jurisdiction, for example that of interstate carriers under the unit and mileage rules. But they cannot be restrained from taxing persons and property within their jurisdiction irrespective of the action of other State sovereignties upon the same property. In other words, the complications growing out of the fact, that the property may exist in one State and the paper representing it in another, may involve a form of double taxation by competing State sovereignties, in which they cannot be restrained under the operation of the Fourteenth Amendment.[2]

[1] Davidson *v.* New Orleans, 96 U. S. 97, l. c. p. 106.

[2] This subject was carefully considered by the recent National Conference on Taxation, held at Buffalo, New York, May 23, 1901, under the auspices of the National Civic Federation, attended by representatives, both economists and men of large practical experience in taxation, appointed by the governors of some thirty States. The Conference unanimously adopted the following resolution, after full discussion, as expressive of its views:—

"Whereas, Modern industry has overstepped the bounds of any one State, and commercial interests are no longer confined to merely local interests; and

"Whereas, The problem of just taxation cannot be solved without considering the mutual relations of contiguous States; be it

"Resolved, That this Conference recommend to the States the recognition and enforcement of the principles of interstate comity in taxation. These principles require that the same property should not be taxed at the same time by two State jurisdictions, and to this end that if the title deeds or other paper evidences of the ownership of property, or of an interest in property are taxed, they shall be taxed at the *situs* of the property, and not elsewhere. These principles should also be ap-

§ 429. Duplicate inheritance taxation.

The duplicate taxation of inheritances, that is by both Federal and State governments, was a necessary result of two sovereignties having jurisdiction in the same territory exercising their taxing power upon the same subject. This has now been removed by the repeal of war taxes levied under the act of 1898.

There is however double taxation of inheritances in another form, where the decedent domiciled in one State at his death owns personal property in other States, which is subject to the latter's taxing laws. Thus a State may impose a tax not only upon the inheritance by will, or its own intestate laws, of the property of decedents domiciled therein, but may also impose a tax upon the property located in its territory which passes under the inheritance laws of any other State. Thus the decedent may have been domiciled in one State, his personal property may be located in another State or in a foreign country, while the heir or legatee may live in a third jurisdiction. Thus in New York the courts have enforced the inheritance tax of that State against the money on deposit in a New York bank belonging to a citizen of Pennsylvania. The court said[1] that "the case is one of some hardship, for the reason that the *whole estate* of the decedent is taxable in Pennsylvania, and, if the property referred to is taxable here, the right of succession to it will cost 10 per cent of its value. * * * It is unfortunate that the laws of the different States relating to succession taxes are not uniform and framed to prevent double taxation."

In another case the same principle was extended by the New York Court of Appeals to bonds of a foreign corpora-

plied to any tax upon the transfer of property in expectation of death, or by will, or under the laws regulating the distribution of property in case of intestacy."

[1] In re Burr's Estate, 38 N. Y. Supp. 811, and cases cited in the opinion.

tion and bonds and certificates of stock of domestic corporations, owned by a non-resident decedent but deposited in a safe deposit vault within the State. United States bonds however were held not to be included in the words of the statute. The court said the legislature intended to repeal the maxim *mobilia personam sequuntur* so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of that State.[1]

Under the same statute the shares of the capital stock of a domestic corporation, though the certificates were in another State in the possession of a non-resident decedent at the time of his death were declared "property within the State," while bonds of a like corporation held in like manner[2] were not included in the designation "property within the State."

On the other hand, in New York personal property of a resident decedent, wheresoever situated, whether within or without the State, was held subject to the inheritance tax,[3] as this was imposed on the right of succession, which was based on the enabling legislation of the State.

[1] In re Whiting's Estate, 150 N. Y. 27, and 34 L. R. A. 232; see also Hondayer's Estate, 150 N. Y. 37, and 34 L. R. A. 235.

[2] In re Bronson, 150 N. Y. 1, and 34 L. R. A. 238.

[3] In re Estate of Swift, 137 N. Y. 77, and 18 L. R. A. 709.

In Orcutt's Appeal, 97 Pa. 179, the Pennsylvania statute was construed as including only personal property of a tangible nature actually situated or used for business purposes within the State. But in a later case, In re Lewis's Estate, 52 Alt. Rep. 205, it was held that the intangible personalty of a non-resident decedent was subject to the collateral inheritance tax within the State, where the executor having taken out ancillary letters elects to have full distribution of the fund made there and this is acquiesced in by the legatees. The court said the same result would follow where property was in possession and control of a resident agent with power of investment and reinvestment. For collection of cases both English and American on the subject of

§ 430. Question one of construction and not of legislative power.

It is clear therefore that this question of duplicate taxation under inheritance tax laws is one of the intent of the legislature as shown in the construction of the statute, and not a question of the power of the State. As the right of inheritance either in the case of wills or intestacy is dependent upon the statute, the State can impose conditions upon the enjoyment of this right wherever the personal property is located. On the other hand, the State has the power to tax, whether in property or inheritance taxation, the property localized within its jurisdiction. The cases in the State courts upon this matter of duplicate taxation are all dealt with upon the question of construction and not of power.

This distinction is clearly illustrated by the recent decision of the Supreme Court in construing the inheritance tax law enacted by Congress in 1898, as not including the personalty in this country passing under will or intestacy of parties domiciled abroad. While it was within the power of Congress to tax the succession in such cases, it had not done so.[1]

§ 431. Due process of law in taxation requires legislative authority.

Due process of law in taxation requires not only that a tax must be levied for a public purpose appertaining to the district taxed, and upon property, business or persons within the lawful jurisdiction of the State, but also that the taxing power be exercised by the legislative authority of the State. The power of taxation is a sovereign power

resident and non-resident decedents in inheritance taxation, see Dos Passos on Inheritance Tax Law, 2d Ed., § 47.

[1] Eidman *v.* Martinez, 184 U. S. 578.

exercised by the legislative authority of the government, and taxes can only be collected when the property has been assessed and taxes collected in the mode specifically prescribed by law. The subjects of taxation under constitutional limitations, Federal and State, are to be selected by the legislative discretion and the taxes levied under a definite rule of apportionment, with provision for valuation and hearing where taxes are upon value. The failure of the legislature to exercise this authority cannot be supplied by executive officers, or by the courts. This sovereign legislative power of taxation cannot be delegated, except to the municipal subdivisions of the State.

This fundamental canon of taxation was forcibly illustrated in the recent decision of the Supreme Court of Indiana, holding that life insurance policies, although "property" within the State and therefore subject to the taxing power of the State, had not been subjected to taxation by the General Assembly.[1] The State constitution provided that "all property within the jurisdiction of the State, not expressly exempted, should be subject to taxation;" and it also provided that "the General Assembly shall * * * prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal * * * etc. * * * purposes, as may be specially exempted by law." The statute specifically prescribed what "personal property" should include, mentioning different classes; and also provided what should be included in the schedule required to be filed by the taxpayer, life insurance policies not being mentioned in either enumeration, although the latter contained in the concluding clause, "all other goods, chattels and personal property, not heretofore specifically mentioned, and their value, except property specifically exempt

[1] State Board of Tax Commissioners *v.* Holliday, 150 Ind. 216, two of the five judges dissenting.

from taxation." The State Board of Tax Commissioners had directed the local assessor to include life insurance policies, and furnished directions for their valuation. The State Court held that this was unauthorized and illegal, and the collection of the tax was enjoined.

In this case, and in other cases [1] under similar provisions in State constitutions, the mandate of the constitution is addressed to the legislative discretion and necessarily requires legislative action in the selection of the subjects of taxation. Thus the court said in this case: "It is, therefore, a legislative power to select the subjects for taxation, and this constitutional provision imposes the duty and limitation upon the legislature of providing by law regulations or methods for a just valuation of all property, both real and personal, for taxation. Where the legislature has not exercised this power, no other department of the State government can supply the omission, and where no such regulation has been prescribed by law as to any particular species of property, then such property cannot be taxed. This conclusion may rest either on the inference from such failure to prescribe such regulations that the legislature did not intend to select that particular species of property as a subject of taxation, or, regardless of the legislative intent, the failure to prescribe such regulations leaves such property unselected as a subject of taxation."

[1] Riley *v.* Western Union Tel. Co., 47 Ind. 511; County of Erie *v.* City of Erie, 113 Pa. St. 360; Louisiana Co. *v.* New Orleans, 31 La. Ann. 440; Mississippi Mills *v.* Cook, 56 Miss. 40; Maguire *v.* Board of Commissioners, 71 Ala. 401; Stratton *v.* Collins, 43 N. J. L. 562. In Loan and Homestead Association *v.* Keith, 153 Ill. 609, an act declaring stocks and notes of Homestead and Loan Association not subject to taxation was held to be unconstitutional as an exemption prohibited by the constitution. As to the legislative power in the absence of constitutional restriction, see the exhaustive opinion in Wisconsin Central R. R. Co. *v.* Taylor Co., 52 Wisc. 37.

The legislative power of taxation is inherent, and the State constitution is only operative as a restraint, not as a grant of power. It is in this respect distinguished from the taxing power of Congress, which, as hereafter shown, is based upon the grant of the United States Constitution. The mandate of the State constitution is not effective as a restraint upon legislative power when it is made dependent upon affirmative legislative action, and is consequently necessarily addressed to legislative discretion, as there is no method of enforcing legislative action by judicial authority, even in obedience to such a constitutional mandate. A State tax therefore does not require an express authorization in the State constitution, but it does require express legislative authority.[1]

Thus a constitutional provision that all laws exempting property from taxation shall be void applies to affirmative exemptions, not to laws which do not in terms exempt certain property, and not to mere casual omissions. While the Constitution may make it the clear duty of the legislature to see that no class of property in the State escapes taxation, unless the legislature exercises its legitimate function and subjects certain property to taxation, the constitutional provision cannot, because of such lack of legislation, become self-enforcing.[2]

§ 432. State construction of legislative authority conclusive.

While the legislature must select the subjects of taxation and make that selection effective by necessary regulations

[1] The cases arising under constitutions directing legislative action must be distinguished from those under constitutions which are construed as specifically legislating on taxation, naming the subjects of taxation, leaving no room for legislative discretion, see People *v.* Keith, 153 Ill. 609; see constitutions *infra*, Appendix.

[2] Supreme Court of Missouri in Kansas City *v.* Building & Loan Association, 145 Mo. 50, 53. It was held in the same State that where

for assessment, this does not mean that every species of property must be specifically named for taxation. General words of description are sufficient, as the question is one of determining the legislative intent by the ordinary rules of statutory construction. "General words in any instrument or statute are strengthened by exceptions, and weakened by enumeration."[1] The courts will also presume that the legislature intended to carry out the directions of the constitution, and will so construe the statute, whenever such construction is admissible.

But "due process of law" in this sense, the exercise of the taxing power of the State under its constitution and statutes, is conclusively determined by the State courts, and involves no Federal question after such determination has been made. The taking of property by State taxing officials, without due process of State law, is a violation of the Federal as well as the State constitution; but the judgment of the State court is conclusive as to the construction of its constitution and statutes; and that construction will be followed by the Federal courts, in whatever form their jurisdiction may be invoked.

Thus in Arkansas the State constitution declared that all laws exempting property from taxation, other than as provided therein, should be void; and further declared that all property subject to taxation should be "taxed according to value to be ascertained, in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State." The legislature passed an act directing the Board of Railroad Commissioners not to

the revenue laws direct the assessment and taxation of "all real estate not exempt therefrom," these provisions are broad enough to include property held by a municipality as trustee for charitable uses, St. Louis *v.* Wennecker, 145 Mo. 230.

[1] Supreme Court of Pennsylvania in Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 147.

include in the schedule of property of railroad companies assessed by them "embankments, tunnels, cuts, ties, trestles or bridges." The State board declined to follow this direction, deeming the act unconstitutional, and included this property in the assessment. The railroad company sought in the State court to enjoin the entire assessment on the ground that the action of the board was not in conformity to the statute, and that if the statute was void, the whole assessment fell with it. The State court, and the Supreme Court of the State on appeal, held that the act was unconstitutional, but that it was clearly separable from the revenue act, and that the assessment was valid. The suit was carried to the Supreme Court by writ of error, and at the same time was heard another case, wherein suit had been filed in the United States Circuit Court by the non-resident trustees of a mortgage of the railroad company seeking the same relief, and wherein demurrer had been sustained, and the bill dismissed in the Circuit Court.

The Supreme Court[1] affirmed the judgment of the Circuit Court, and dismissed the writ of error to the State Supreme Court because there was no Federal question involved, saying on this latter point: "The complaint of the plaintiffs in error and appellants is, that the board of railroad commissioners did not follow the act of the legislature. If that act was valid, no ground lay for complaint that the State had done anything to deprive the company of its property without due process of law. If the act was, in the particulars mentioned, unconstitutional, as the Supreme Court of the State afterward held, there was no just ground of complaint that the railroad commissioners had refused to follow its directions."

In affirming the judgment of the Circuit Court it was

[1] Huntington v. Worthen, 120 U. S. 97.

said, that under the State constitution laws which produce exemptions indirectly must be equally inoperative with those which exempt directly; that the conflict between the statute and constitution was obvious, and the unconstitutional part of the act was clearly separable from the remainder.

§ 433. The constitutionality of statutes is for judicial, not executive determination.

In the cases cited in the three preceding sections, the action of the State taxing board was in direct opposition to the rule that the constitutionality of statutes is for judicial, not executive determination. In the Indiana case the taxing board undertook to supply the omission of the legislature in carrying out the directions of the constitution, and this it was held they had no power to do. In the Arkansas case the tax commission refused to follow the directions of the legislature, because they were advised that the act was in conflict with the constitution. In this they were subsequently sustained for the reason that the act was held by the court to be unconstitutional. There was however no conflict with the law declared in the Indiana case, as there is a clear distinction between the power to declare invalid a legislative act, conflicting with a prohibitory constitutional provision, and the authority of an executive board to supply the omission of the legislature to obey the direction of the Constitution.

On the question of the right of the Arkansas board to pass upon the validity of the legislative act, the Supreme Court said: "It may not be a wise thing, as a rule, for subordinate executive or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it, if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and productive of great inconvenience to the public; but

still the determination of the judicial tribunals can alone settle the legality of their action. An unconstitutional act is not law; it binds no one, and protects no one."[1]

[1] See State *v.* Auditor, 47 La. Ann. 1679, where the right of executive officers to pass upon the constitutionality of a law is denied.

CHAPTER XV.

EQUAL PROTECTION OF THE LAWS.

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§ 434. Immediate purpose of clause.

The guaranty in the Fourteenth Amendment of the equal protection of the laws to all persons within the jurisdiction of the State has been invoked in numerous cases of

alleged discrimination, not only in taxation, but also in the exercise of the police power of the State.

This phrase, unlike the historic phrase "due process of law," was novel in American constitutional law, and its incorporation in the amendment, as shown by the history of the time, was clearly for the purpose of emphasizing the principle of equality of civil rights for the benefit of the newly enfranchised freedmen. Attention has already been called to the difference in the language of the two prohibitions. The State must not deprive any person of life, liberty or property without due process of law, but the equal protection of the laws is limited to persons within its jurisdiction, so that a foreign corporation, not admitted to do business in the State and therefore not within its jurisdiction, could not claim the protection of this clause in the Fourteenth Amendment. The purpose of this provision and its application to discriminations in taxation are clearly shown in the Act of Congress already referred to,[1] which, was enacted to enforce this primary purpose of the amendment, and declares that all persons within the jurisdiction of the United States shall have equal rights with white citizens, including equal rights in taxation.

§ 435. What is "the equal protection of the laws?"

The Supreme Court has declined to define what is the equal protection of the laws. Thus it was said in a recent case, holding invalid the anti-trust law of Illinois:[2] "What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the States will show. It is sometimes difficult to show that a State enactment, having its source in a power not contro-

[1] § 1977, R. S. U.S. *supra*, § 310.

[2] Connolly *v.* Union Sewer Pipe Co., 184 U. S. l. c. 558.

verted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.'" The court in this and in other cases quoted the language of Mr. Justice Field upon the amendment in one of the early cases,[1] where he said "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights," and, "that class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

§ 436. Equality in taxation under Fourteenth Amendment.

The guaranty of the equal protection of the laws therefore is directed against *arbitrary discriminations* in taxation, and in this sense secures equality in taxation. In this however no new right in relation to taxation is created. The power to tax was inherent in the sovereignty of the States before, as it has been since, the adoption of the amendment. In the language of the Supreme Court,[2] the "amendment conferred no new and additional rights, but only extended the protection of the Federal Constitution over rights of life, liberty, and property that previously existed under all State constitutions." The guaranty of equal protection of the laws therefore protects the citizen

[1] Barbier *v.* Connolly, 113 U. S. 27, p. 31.

[2] Mobile & Ohio R. Co. *v.* Tennessee, 153 U. S., l. c. 506.

against arbitrary discriminations effected by the State in the exercise of its power of taxation, as it protects him against the arbitrary exercise of any of the powers of government.

Mr. Justice Miller said in the opinion in Davidson *v.* New Orleans,[1] page 106, in reference to the claim that plaintiff's property had previously been assessed for the same purpose and the assessment paid, "if this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the States." This must however be construed with reference to the facts of the case before the court, which involved a special assessment for a public improvement. The claim of double and unequal taxation was apparently based upon the levy of this tax in addition to that for general public purposes upon complainant's property with other property of the State. It is clear that the equal protection of the laws does not prevent that form of double or unequal taxation.[2]

The equality therefore which is protected by the Fourteenth Amendment is that which is inherent in taxation, and is essential to a valid exercise of the taxing power. There should be, not only a public purpose pertaining to the district taxed, but also an apportionment by the legislative power levying the tax with reference to a uniform standard. If contribution is not required according to this principle of apportionment, equally and uniformly from all of the same class of subjects within that jurisdiction, it is not a tax, but an arbitrary exaction. Uniformity and equality in this sense, like a public purpose,[3] are involved in the very conception of taxation. These fundamental principles are

[1] See § 361.

[2] Chapter XIII, *supra*.

[3] Loan Assn. *v.* Topeka, *supra*, § 341.

declared by many of the State constitutions, some of which contain also the provision that taxes shall be levied for a public purpose only; but such provisions do little more than state in precise language the principles of constitutional law which, whether declared or not, would inhere as essential limitations in the power of taxation.[1]

§ 437. Equality and efficiency in taxation through diversity of methods.

It is not however necessary to uniformity and equality in this fundamental sense that all the subjects of taxation in the State should be taxed in the same manner or by the same system of assessment. This would obviously be impossible, as the taxing power extends not only to property, but to occupations and persons within the State's jurisdiction, and the same rule of assessment could not be applied to these different classes of subjects. Even as to property taxation alone, the complicated conditions of modern industrial civilization and the mobility of many forms of personal property which effectually elude the tax-gatherer, require special adjustment of taxing systems to insure even an approximation to equality in the distribution of public burdens.

The general property tax, that is, the taxation of everything, tangible and intangible, seen and unseen, by one uniform rule, is the natural outgrowth of our political conditions, but has proven inadequate in the complexity of modern conditions and has developed the grossest form of inequality. This has been pointed out by an eminent economist,[2] who says that a tax which aims to be equal but is ineffectual, produces a kind of inequality, tending to increase

[1] Cooley on Constitutional Limitations, 2d Ed., p. 546.

[2] President Hadley of Yale University in Johnson's Encyclopedia, title "Taxation."

as time goes on, and worse than all other kinds; but that a tax which aims to be *effective*, even in apparent disregard of equality, tends by a constant process of economic adjustment to be more and more equal.[1]

§ 438. Classification for taxation.

It necessarily follows therefore that special forms of taxation adjusted to different classes of property are found essential in the administration of State taxing systems, and, in the absence of specific constitutional restrictions requiring all property to be taxed according to the same method of assessment, are consistent with the fundamental principles of equality and uniformity inherent in taxation. Thus it has been determined that the right to levy special assessments for public improvements[2] is consistent with these principles, provided the assessment is uniform in the same taxing district, and the constitutional requirement in many State constitutions that taxes upon property shall be in proportion to value has been held not to apply to other forms of taxation, such as taxes upon business, incomes and the like, provided they are uniform upon the same class of subjects.[3] A very large discretion therefore is necessarily vested in the legislature, in order that, subject to the requirements of the State constitution in regard to selecting, specializing and classifying the subjects of taxation, it may adjust the system of taxation to local conditions, so as to assure the nearest approximation to equality. This right to select, specialize and classify is for the purpose of best securing equality in taxation through the efficiency of the system adopted, and is clearly distinguished in its very

[1] See also the New York Tax Commissioners' Report of 1871; David A. Wells' "Theory and Practice of Taxation."

[2] *Supra*, Chapter XIII.

[3] Glasgow *v.* Rowse, 43 Mo. 479.

nature from discriminations in classification which are made for the very purpose and which have the necessary result of imposing upon obnoxious classes a burden from which favored classes are relieved.

The right to specialize and classify for taxation must be exercised subject to the restrictions in the State constitution, which in many cases requires all property to be taxed according to a uniform rate, and thus precludes the subjection of any property to a different rate.[1] Under such constitutional restrictions it may become important to determine whether a tax is levied as a property tax or as a license tax upon the business conducted or privilege exercised. If a property tax, it must be levied, under the rule of uniformity, according to the rate limited by the constitution; while, if a business or privilege tax, it is not subject to such requirement, though it must be uniform upon all of the same class of subjects.[2] The equal protection of the laws guaranteed by the Federal constitution has of course no relation to such specific restrictions in State constitutions. It recognizes the right to specify and classify whether in property or business taxation, and only requires that the classification be on a reasonable basis and that the tax be uniform and equal as to all of the same class.[3]

[1] Thus it was held in Oregon, Ellis *v.* Frazier, 53 L. R. A. 454, that the imposition of a specific tax of $1.25 upon each bicycle regardless of value, for the construction of bicycle paths, violated a constitutional requirement that the rates of taxation must be equal and uniform. In Smith *v.* County Commissioners, 117 Ala. 196, a tax of one dollar upon each road wagon, for the benefit of public roads, was held to violate a similar constitutional provision. And in Pittsburgh, etc., Railroad Co. *v.* State, 49 Ohio St. 189, and 16 L. R. A. 380, a statute requiring railroads to pay a dollar a mile for each mile of track was held invalid under the State constitution.

[2] See State ex rel. *v.* Stephens, 146 Mo. 662.

[3] In State *v.* Travelers' Ins. Co., 73 Conn. 255, there being no provision in the State constitution restricting the legislative power of taxation, the court denied that the Constitution of the United States

§ 439. Equal protection of the laws does not require iron rule of equal taxation.

The Supreme Court has uniformly observed the distinction between the equality in taxation, which is inherent in the conception of a tax, and that which is enforced by the requirement that everything shall be taxed in the same manner, and has in a number of cases affirmed the power of the State to make reasonable classifications in the adjustment of its system of taxation according to its own judgment of the public needs. The leading case on this subject is Bell's Gap Railroad Co. *v.* Pennsylvania,[1] wherein the court affirmed on motion the judgment of the Supreme Court of Pennsylvania. This case involved the validity of a law of Pennsylvania, subjecting all moneyed securities to a tax at the rate of three mills on the dollar of their actual value, except bonds and other securities issued by corporations, which were taxed at three mills on the dollar of their nominal or par value. The Supreme Court, through Mr. Justice Bradley, declared that this was not an unjust discrimination. The presumption is that corporate securities are worth their face, and under the law the persons who held them were not affected by the tax unless they received the interest from which the tax was paid. The court added at page 237:—

"But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same

contains any provision, express or implied, requiring taxation to be equal and uniform. The question involved was as to the validity of the classification for taxation of resident and non-resident corporation stockholders, and the decision was affirmed by the Supreme Court, 185 U. S. 364, *supra*, § 403 as not involving any discrimination. The State court said in its opinion that the legislature could not make any exaction it pleased under the form of a tax, as an arbitrary exaction would be neither taxation nor legislation. "Such guaranties are not limitations upon the power of taxation, but on all power."

[1] 134 U. S. 233.

regulation. The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of

intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

§ 440. Specification of railroads is reasonable classification for taxation.

This principle of classification has been applied to railroads by the Supreme Court in a number of cases, and the power of the States to specify railroads as a class for taxation has been upheld. This was declared in a recent decision sustaining a statute of Florida,[1] whereby a reassessment of railroads was ordered for certain years in which taxes had not been paid, while no provision was made in regard to reassessment of other property which had been underassessed during the same period. The court said that taxes are not debts in the ordinary sense of the term, and, after quoting the language of the Bell's Gap Railroad case, added, at page 476: —

"It is well known that the States vary materially in their systems of taxation. Each determines for itself what in its judgment is best for the interests of its people. In some there are general exemptions of particular classes of property, such as property used for religious, educational and benevolent purposes. Some, in order to encourage certain industries, such as manufacturing, make either general or special exemptions. Some think it for their best interest to derive their revenues from personal property, corporations and licenses, and exempt real estate. In some, contracts for exemption are authorized by the State constitution; in others, they are forbidden. Now, considering the great diversity in these systems it would obviously have worked a marked revolution if the first section of the Fourteenth Amendment had been construed as compelling a cast iron rule of equal taxation. It was not in-

[1] Florida Central & P. R. Co. *v.* Reynolds, 183 U. S. 471.

tended, as held in the case quoted from, and also in Barbier *v.* Connolly, 113 U. S. 27, to restrain the legislature from any proper and legitimate classification, both as respects property for taxation and the methods of assessment and taxation. Doubtless it would prohibit a State from selecting some obnoxious person, and casting upon his property the sole burden of taxation, or a burden differing from that cast upon others whose property was similarly situated; but it does not prevent a State from exercising its judgment as to the property to be taxed and the modes of taxation, providing all property similarly situated is treated in the same way."

If the State had deemed it necessary to encourage the building of railroads, it would have had the power to exempt their property; and, conversely, the State might have subjected railroads to taxation while exempting some other classes of property. Since it had this power to classify in the first instance, it had the same power as to property, which in past years had escaped taxation. Classification is a matter of State policy to be determined by the State, and the Federal government is not charged with the duty of supervising the State's action. It might have been found that the railroad delinquent tax was large and that on the other property was small, not worth the trouble of special provision therefor. The court added: "If taxes are to be regarded as mere debts, then the effort of the State to collect from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution." [1]

[1] Justice Brown dissented, saying that he did not think that a particular species of property could be arbitrarily taken and subjected to a specific tax for a series of years on the ground that the State officers had

§ 441. Special methods of assessment of railroad property sustained.

The law-making power determines all questions of discretion or policy in ordering, assessing and collecting taxes, and determining the necessary rules and regulations. The mere fact that a special procedure is provided for the taxation of a certain class of property, different from that provided for another class or from the general procedure in taxation, will not make the act providing such special procedure invalid. These are matters of detail, within the legislative discretion.[1]

The power to classify property for taxation on any reasonable basis, includes also the power to provide special methods of assessment for the different classes. Thus a statute of a State assessing railroad property which requires the company to return the length of the road within and without the State, values the property within as an entirety, and distributes to each county and city along the line its mileage proportion, is valid. The court said,[2] that there was no merit in the objection that the defendants were denied the equal protection of the laws. The Constitution does not forbid the classification of property for the purposes of taxation and the valuation of different classes by different methods. The fact that the legislature had chosen to call a railroad, for the purposes of taxation, real estate, did not identify it with farming lands and town lots in such a sense, as to require the employment of the same methods and machinery of the law to ascertain the value for taxation.

In a later case,[3] the court sustained a statute of the State

neglected their duty, and added that this kind of discrimination seems to be measured only by the rapacity of the legislature.

[1] Thomas *v.* Gay, 169 U. S. 283.

[2] Kentucky Railroad Tax Cases, 115 U. S. 321.

[3] Columbus Southern R. Co. *v.* Wright, 151 U. S. 470, affirming 89 Ga. 574.

of Georgia, which enacted a system of taxing railroads, whereby the rolling stock and other unlocated personal property of the railway was distributed for taxation purposes to and for the benefit of the counties traversed by the railroad. The argument was advanced that this was an unjust discrimination, because other personal property, both tangible and intangible, was taxed in and by the county where the owner resided. There was in this no violation of the Federal Constitution, the Court said, adding, l. c. p. 478: —

"This is hardly an open question. Various modes of taxing railroad property are adopted by the different States. In some, railroad companies are taxed upon their property as a unit. In others, the road and the property in each county are separately assessed, and in still others, the whole road is assessed, and then the assessment apportioned among the several counties and towns. These and all similar modes of taxation are subject to the legislative discretion of the respective States, and do not ordinarily present any Federal question whatever. But the mode of distribution of the unlocated or transitory personal property is a matter of regulation by the State legislature, which in no way involves a violation of the Fourteenth Amendment."

The court declared that it was clearly within the province of the legislature of Georgia to give such property a different *situs* for taxation from that of the company's principal office.

The Supreme Court also sustained an act of South Carolina assessing against a railroad its proportion of the salary and expenses of the railroad commissioners of the State, under the provisions of the general railroad law thereof.[1] There was no denial of the equal protection of the laws, although the railroads, in addition to this burden imposed

[1] Charlotte Railroad Co. *v.* Gibbes, 142 U. S. 386.

upon them alone, were also taxed equally with other property. They received special privileges from the State, their business was affected with a public use, and they were properly charged, in the legislative discretion, with their share of the expenses incurred by the State in connection with their business.

§ 442. Right of appeal not essential to "equal protection of the laws."

While due process of law requires that there shall be opportunity for hearing at some stage in the valuation of the property,[1] a right of appeal is not necessary, nor is there any denial of the equal protection of the laws because an appeal with a second hearing is permitted to one class of taxpayers while not allowed to another.

Thus it was said by the Supreme Court in the Indiana railroad cases:[2] —

"Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the State board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so; and the power of a State to make classifications in judicial or administrative proceedings carries with it the right to make such a classification, as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing. Prior to the passage of the Court of Appeals act by Congress, in 1891,

[1] See *supra*, § 321.
[2] See *supra*, § 323.

a litigant in the Circuit Court, if the amount in dispute was less than $5,000, was given but a single trial and in that court, while if the amount in dispute was over that sum the defeated party had a right to a second hearing and in this court. Did it ever enter into the thought of any one that such classification carried with it any denial of due process of law?" [1]

On the other hand, there is no denial of the equal protection of the laws in the fact, that the law gives the assessors in cases of corporations two chances to arrive at the correct valuation of real estate, when they have but one in the case of individuals.[2]

§ 443. Foreign corporations and "equal protection of the laws."

As already seen, a State may impose such terms and conditions as it thinks proper in admitting foreign corporations to do business in its jurisdiction, and it does not thereby deny the corporation equal protection of the laws.[3] The court said in Home Industrial Co. *v.* New York, that equal protection of the laws does not prevent the classification of property for taxation, subjecting one kind of property to one rate of taxation and another kind to a different rate, distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property, nor does the amendment prohibit special legislation. Indeed the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be attained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under

[1] 154 U. S., p. 427.
[2] New York *v.* Barker, 179 U. S. 279.
[3] Chapter V.

similar circumstances and conditions in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York, all corporations, joint-stock companies and associations of the same kind were subjected to the same taxation. The same rule was applicable to all under the same conditions in determining the rate of taxation. There was no discrimination in favor of one against another of the same class.[1]

§ 444. Exemption of producers in license taxation.

The principle of classification in taxation was applied by the court to an act of Louisiana imposing a license tax of $3,500 on the business of refining sugar and molasses, and exempting planters and farmers refining these products for themselves. The court, sustaining the Supreme Court of Louisiana, held that this discrimination did not violate the Fourteenth Amendment.[2]

[1] Home Ins. Co. *v.* New York, 134 U. S. 594; Philadelphia Fire Ins. Co. *v.* New York, 119 U. S. 110. Justice Harlan in his dissenting opinion in the latter case said: "The denial of the equal protection of the laws may occur in various ways. It will most often occur in the enforcement of laws imposing taxes. An individual is denied the equal protection of the laws if his property is subjected by the State to higher taxation than is imposed upon like property of other individuals in the same community. So, a corporation is denied that protection when its property is subjected by the State, under whose laws it is organized, to more burdensome taxation than is imposed upon other domestic corporations of the same class. So, also, a corporation of one State doing business by its agents in another State by the latter's consent, is denied the equal protection of the laws, if its business there is subjected to higher taxation than is imposed upon the business of like corporations from other States. These propositions seem to me to be indisputable. They are necessarily involved in the concession that corporations, like individuals, are entitled to the equal protection of the laws." Justices Miller and Harlan dissented in this case on the ground that the tax was in effect a tax upon the bonds of the United States held by the corporation; see Manchester Ins. Co. *v.* Herriott, 91 Fed. 711.

[2] American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, affirming 51 La. Ann. 563. Justice Harlan concurred in the result.

It said that on the question whether the sugar company was a manufacturer, within the meaning of the Louisiana constitution, it was bound by the decision of the Louisiana court, but that it might properly consider whether the company was denied the equal protection of the laws, and added at page 92: —

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production. The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whiskey, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articles are the natural products of the farm, — such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is the natural and ultimate

product of the cane, and the various steps taken to perfect such product are but incident to the original growth."

The court said that similar discriminations in Acts of Congress had been sustained, and that the one in question was obviously intended as an encouragement to agriculture and did not deny to persons and corporations engaged in the general refining business the equal protection of the laws.

§ 445. Classification in taxation and in police legislation compared.

In the case last cited the court sustained the right of the State to discriminate in taxation by exempting a certain class of producers for the reason that the exemption was not pure favoritism, but was based upon legitimate considerations of public policy. The question is thus left open for determination, in every case of classification for taxation, whether the discrimination is arbitrary and oppressive or natural and reasonable. This decision sustaining the Louisiana tax was strongly urged at the following term in defense of the anti-trust law of Illinois.[1] The court however held the law invalid on the ground that agricultural products or live stock in the hands of the producer or raiser were exempted from the operation of the statute, which prohibited the recovery of the price of the article sold by any trust or combination formed in restraint of trade or competition in violation of the act. This discrimination was held to be a denial of the equal protection of the laws; and, answering the argument that the case was controlled by the decision in the case last cited and that of Bell's Gap R. Co. *v.* Pennsylvania, *supra*, § 439, the court said, l. c. p. 562: —

"The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is suffi-

[1] Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540.

cient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a State enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling, unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great, and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States."

But, the court said, it is one thing to exert the power of taxation so as to meet the expense of the government, at the same time indirectly building up or protecting particular interests, and quite a different thing to discriminate in the exercise of the police power by declaring that certain classes shall be exempt from the operation of general criminal statutes. It continued: —

"We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a State. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy

rights that are given or secured by the supreme law of the land. We only need to say, in this connection, that the constitutional validity of the statute of Illinois now before us is not necessarily to be determined by the same principles that apply to taxing laws." [1]

§ 446. **Difficulty of classification.**

The difficulty in drawing the line between reasonable and unreasonable classification is forcibly illustrated by two decisions of the Supreme Court, one holding void and the other holding valid under the guaranty of equal protection of the laws special legislation in relation to railroads. Neither was a case of taxation proper, both relating to taxation of costs in civil actions. The former involved an act of the State of Texas requiring railroad companies in all cases of claims under $50 to pay an attorney's fee of not exceeding $10 to the party successfully suing, provided the suit was brought thirty days after the refusal of the company to pay the claim.[2] The court said that this was an

[1] Justice McKenna dissented, saying that the principle of classification is not different in tax laws from that in any other laws. He asked "what ingenuity can find a difference in the act and process of sugar refining when done by a purchaser of raw sugar, and a raiser or planter of it; what difference in the product, after it shall be refined, or in any element, thing, or circumstance which can affect its use or sale? The whole and only distinction in the classes which the statute made was between the grower of sugar and the buyer of it — the exact and only distinction of the Illinois law now held to be void, and yet the Louisiana law was sustained as constitutional." He also said that the court could not go into the difference of situations on which the discrimination in the statute was based, as their consideration of such differences would take them from legal problems to economic ones, adding: "This demonstrates to my mind how essentially any judgment or action, based upon those differences, is legislative and cannot be reviewed by the judiciary."

[2] Railroad Co. *v.* Ellis, 165 U. S. 150. Chief Justice Fuller and Justices Gray and White dissented, saying that costs in civil actions at law are the creature of statute; and that there was a reasonable basis for the classification, as railroads might vexatiously refuse to pay such claims. As to

arbitrary selection which could never be justified by calling it classification, and added at page 165: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment and that in all cases it must appear not only that a classification has been made, but also that it is one based on some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained."

In the other case a statute of Kansas was sustained providing that in all actions brought for damages caused by fire from the operation of the railroad, the court should allow the plaintiff on recovery a reasonable attorney's fee, which should become part of the judgment.[1] Justice Brewer, who had rendered the opinion of the court in the Ellis case, *supra*, also wrote this opinion holding that there was a reasonable basis for this legislation, which fact distinguished it from the Texas statute. There was peculiar danger of fire from the running of railroad trains, especially in a prairie State like Kansas; and so, when the legislature of that State made a classification and included in one class all corporations engaged in this business of peculiar hazard, it did so upon a difference

the regret expressed in the opinion that the court was not favored with a brief from the claimant, that is, the plaintiff below, the dissent said: "It is hardly surprising that the owner of a claim for fifty dollars only, having been compelled to follow up through all the courts of the State, the contest over this ten dollar fee, should at last have become discouraged, and unwilling to undergo the expense of employing counsel to maintain his rights before this court."

In Louisiana Liquidation Commissioners *v.* Marrero, 106 La. 130, a provision allowing an attorney's fee to the attorney for the tax-gatherer, to be paid by the unsuccessful tax resistant, was held not violative of the equality clause of the Fourteenth Amendment.

[1] A. T. & S. F. R. Co. *v.* Matthews, 174 U. S. 96.

having a reasonable relation to the object sought to be accomplished, to wit, the securing of protection of property from damage or destruction by fire. The court added, p. 103: [1]—

"Many cases have been before this court, involving the power of State legislatures to impose special duties or liabilities upon individuals and corporations, or classes of them, and while the principles of separation between those cases which have been adjudged to be within the power of the legislature and those beyond its power, are not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near to the dividing line. It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness. The equal protection of the law which is guaranteed by the Fourteenth Amendment does not forbid classification. That has been asserted in the strongest language." [2]

[1] Justice Harlan, with whom concurred Justices Brown, Peckham and McKenna, dissented, saying that the case could not be distinguished from the Ellis case, and adding at page 111: "I am not astute enough to perceive that the Kansas statute is consistent with the Fourteenth Amendment, if the Texas statute is unconstitutional." He concluded: "In my opinion the statute of Kansas denies to a litigant upon whom no duty has been imposed by statute and whose liability for wrongs done by it depends upon general principles of law applicable to all alike, that equality of right given by the law of the land to all suitors, and consequently it should be adjudged to deny the equal protection of the laws."

[2] The difficulty of classification is illustrated in the application of these decisions of the Supreme Court to the Texas statute imposing a penalty of twelve per cent upon life and health insurance companies where a loss occurs, which is not paid within a specified time after demand. The law imposing this tax, "with reasonable attorneys' fees," was held void as violative of equal protection of the laws, by the Texas Court of Civil Appeals in Smith *v.* New York Life Ins. Co., 41 S. W.

§ 447. Inequality of burden does not establish invalidity of tax.

The inequality of burden resulting from the enforcement of a tax does not necessarily establish that the tax itself is unequal and a denial of the equal protection of the laws. Thus an act of Pennsylvania allowing banks to collect from their stockholders and pay eight mills upon the dollar of the par value in lieu of all other taxes, instead of being subject to the ordinary rate of four mills upon the actual value of the stock and surplus, was sustained.[1] The Supreme Court said that there was no discrimination and therefore no denial of the equal protection of the laws, as the right of election was offered all banks, State and national, and that a State has the right to exempt certain corporations from all taxation, and the indirect result that other property has to pay a larger per cent does not invalidate the tax on it or give any right to challenge the law, as obnoxious to the provisions of the Federal Constitution. In this case the inequality of the result came from the election of certain taxpayers to avail themselves of privileges offered to all, and the case was therefore analogous to that incidental inequality resulting from taxpayers availing themselves of the discount offered

Rep. 684, the court following the decision of the Supreme Court in the then recently decided case of Railroad Co. *v.* Ellis. The same statute has since been held valid by the United States Circuit Court of Appeals in Merchants' Life Association *v.* Yoakum, 98 Fed. Rep. 251; and very recently by the Supreme Court in Fidelity Mutual Life Association *v.* Mettler, 185 U. S. 308, Justices Harlan and Brown dissenting, and Brewer, J., concurring in the judgment, as a valid classification, and also valid as a condition upon foreign corporations doing business in the State.

In Clark *v.* Kansas City, 176 U. S. 114, the Supreme Court sustained an act allowing cities to annex adjoining territory, providing that the act should not apply to tracts of land used for agricultural purposes, when the land was not owned by any railroad or other corporation. The court held without dissent that the discrimination was reasonable and not arbitrary.

[1] Merchants' Bank *v.* Pennsylvania, 167 U. S. 461.

for payment before a specified time. The court quoted approvingly the language of the Supreme Court of Pennsylvania: "the argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand."

§ 448. **Equality and uniformity in inheritance taxation.**

The relation of the Federal guaranty of equal protection of the laws to the requirement of uniformity and equality in the State constitutions is forcibly illustrated in the decisions of the Supreme Court and some of the State Supreme courts relating to the classification allowable in inheritance taxation.

In the courts of Ohio,[1] Missouri,[2] and Minnesota,[3] classifications and exemptions based upon the value of the estate or the inheritance, were held to violate constitutional requirements of equality and uniformity in taxation.

In the *Ohio* case, the Supreme Court (of the State) said that a progressive rate of taxation, according to the values of the estate, was in conflict with the provision of the Ohio constitution, that government was instituted for the equal benefit and protection of the people. It was said that the scope of the provision for equal protection of the laws under the Fourteenth Amendment was not broader than the State Bill of Rights, and that a statute authorized by the latter would not be in conflict with the Constitution of the United States.

In *Missouri*, an inheritance tax wherein a progressive

[1] State ex rel. Schwartz *v.* Ferris, 53 Ohio St. 314, and 30 L. R. A. 218.

[2] State ex rel. *v.* Switzler, 143 Mo. 287.

[3] State *v.* Gorman, 40 Minn. 232. See also State *v.* Mann, 76 Wis. 469.

rate was based on the *value* of the estate, was held by the State court to violate the constitutional requirement that taxation should be "uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

In *Minnesota* a probate tax, graduated according to the value of the estate, violated, according to the State court, two provisions of the State constitution, one guaranteeing "justice freely and without purchase, promptly and without delay," and the other providing that "all taxes are to be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the State."

The Supreme Court of *New Hampshire* went further,[1] and held that the exemption of husband, wife, children and grandchildren was violative of the rule in the constitution of the State requiring proportional and reasonable taxes. This ruling has not been followed in other States; and it is held that classification in inheritance taxation, based wholly upon the degree of relationship, so that the tax is levied at a uniform rate upon those bearing the same relationship to the testator, is reasonable and open to no constitutional objection. In the language of the Supreme Court of Massachusetts, such a classification has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privilege is therefore greater.[2] But a discrimination between residents and non-residents of the State, by imposing an inheritance tax upon certain collaterals when non-

[1] Curry *v.* Spencer, 61 N. H. 624.

[2] Minot *v.* Winthrop, 162 Mass. 113, one judge dissenting on the ground that the exemption of estates not exceeding $10,000.00 in value was unreasonable; State *v.* Alston, 94 Tenn. 674; State *v.* Hamlin, 86 Me. 495 and 25 L. R. A. 632; Thyson *v.* State, 28 Md. 577; Eyre *v.* Jacob, 14 Grattan (Va.), 422; Billings *v.* People, 189 Ill. 472; State *v.* Henderson, 160 Mo. 190; Gellsthorpe *v.* Fernell, 20 Mont. 299.

residents of the State, has been held an illegal classification.[1]

§ 449. "Equal protection of the laws" in inheritance taxation.

The Supreme Court however, affirming the judgment of the Supreme Court of Illinois,[2] sustained, as valid under the Fourteenth Amendment, the inheritance tax of that State, which was levied at discriminating progressive rates graduated according both to the degrees of relationship and to the amounts inherited. The court said that, as to the equal protection of the laws, what affords this equality has not been and probably never can be precisely defined; and, after citing former opinions of the court, that it does not prohibit legislation which is limited either in the objects to which it is directed or by the territory in which it is to operate, continued at page 292: —

"It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. Hayes *v.* Missouri, 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may be safely said

[1] In re Mahoney's Estate, 133 Cal. 180. The decision was based on the ground that the discrimination was in violation of Article IV, Section 2, of the Constitution of the United States, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and also violative of Sec. 1977, R. S. of U. S. *supra*, § 310.

[2] Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283, affirming 167 Ill. 122.

that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. * * *

"The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. * * *

"In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. 'Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.'"

On page 296, the court says: "There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so; in a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

In reference to the cases from the State courts, above cited, it was said, l. c. p. 292: "They are authority against the Illinois statute. But it is not necessary to dwell on the points of agreement of the cases. Our inquiry must be not what will satisfy the provisions of the State Constitutions, but what will satisfy the rule of the Federal Constitution. The power of the State over successions may be as plenary in the abstract as appellee contends for. Nevertheless, it must be exerted within the limits of that constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws."

Applying these principles to the statute, it was held that the classification of the Illinois law was within the power of the legislature to make and was reasonable; and that the State had the power to regulate succession. It was true that the amount of the exemption (estates under $20,000 were not taxed) was greater in the Illinois law than in any other, but this was a matter depending upon the judgment of the legislature in each State and could not be subjected to judicial review. The court followed the Illinois court in holding that the tax was imposed on the succession, which is to be regarded as "new property" [1] of the legatee or distributee.

[1] Justice Brewer dissented from the opinion, so far as it sustained that part of the law which graded the rate of the tax upon legacies to strangers by the amount of such legacies, saying, l. c. p. 301: "If this were a question in political economy, I should not dissent, but it is one of constitutional limitations. Equality in right, in protection and in burden, is the thought which has run through the life of this nation and its constitutional enactments from the Declaration of Independence to the present hour." Again, at p. 302: "It seems to be conceded that if this were a tax upon property, such increase in the rate of taxation could not be sustained, but being a tax upon the succession, it is held that a different rule prevails;" and concluded: "But whatever may be the power of the legislature, Illinois had regulated the matter of descents and distributions and had granted the right of testamentary disposition. And now by this statute upon property passing in accordance with its statutes a tax is imposed: a tax unequal because not proportioned to the amount of the estate; unequal because based upon a classification purely arbitrary, to wit, that of wealth — a tax directly and intentionally made unequal. I think the Constitution of the United States forbids such inequality."

After the decision in the Magoun case, the Supreme Court of Pennsylvania, In re Estate of Cope, 191 Pa. 1, and 45 L. R. A. 316, held the inheritance tax of that State, which exempted $5,000 from the two per cent inheritance tax on all personal property passing by will, etc, after deducting debts, was in violation of the Constitution requiring all taxes to be uniform upon the same class of subjects, and prohibiting exemptions. The court in this opinion quotes approvingly the dissenting opinion of Justice Brewer in the Magoun case.

§ 450. Classification by amount in license taxation.

The Supreme Court however, in a recent case,[1] extended the application of this principle of classification by amount to license taxation upon business and affirmed the constitutionality of a city ordinance imposing a license tax upon merchants. Under this ordinance persons in different occupations paid different amounts, and persons in some occupations were classified by the maximum and minimum amount of sales. It was urged in this case that the decision in Magoun *v.* The Bank was not controlling, as that involved only the State power over inheritances. But the court said that it was decided in that case that the inequality between the members of the different classes did not constitute a case of discrimination under the Fourteenth Amendment, that the same principle controlled the case at bar, and that the equality between the members of the same class was sufficient to satisfy the Fourteenth Amendment. It was contended that the tax was really a tax on property, as the final incidence of the tax was on the merchant. But the court replied that "every tax had its final incidence on some individual," and that "that principle could not be urged to destroy well recognized distinctions." The tax was on the privilege of doing business and regulated by the amount of sales, and was not repugnant to the Constitution of the United States.

§ 451. Property taxation and inheritance taxation distinguished.

The principle of classification by amount thus enforced in the case of inheritance taxation and extended to license taxation, has not been applied in the case of property taxation. The right to be secure in the possession of prop-

[1] Clark *v.* Titusville, 184 U. S. 329.

erty when once acquired is admittedly distinct from the right to inherit property, although it must be conceded that the taxation of a business is in effect and incidence a tax upon the property employed in the business. It was argued in the Magoun case that an inheritance tax is not on property, but on the succession, and that the right to take property by devise or descent is a creature of the law, not a natural right, but a privilege. The authority therefore, which confers it, may impose conditions upon the privilege thus granted. It was argued on the one side that the State could exercise its power to the extent of making itself the heir of everyone, and on the other that there was a natural right in the children to inherit. The court did not distinctly pass upon these propositions, but based its decision upon the right of the State to make reasonable classifications in taxation. Justice Brewer remarked in his dissenting opinion that it seemed to be conceded that, if the tax was one upon property, the progressive increase of the rate could not be sustained.

The expressions in the opinions of the Supreme Court, already referred to, concerning the large discretion of the States in the exercise of the taxing power, to vary the rates or forms of taxation, clearly refer to discretion in the adjustment of taxation, so as to better approximate the equal distribution of the public burdens. To avoid disturbing this adjustment, the court has sustained the exercise of the State's discretion and has been reluctant to disturb State classification in inheritance and license taxation. The court has also reiterated in these recent opinions the words of Mr. Justice Bradley, in the Bell Gap Railroad case, that "clear and hostile discriminations of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition."[1]

[1] Bell's Gap Railroad Co. *v.* Pennsylvania, *supra*, § 439. Upon this subject of discriminating taxation as violative of the Fourteenth Amendment, see Guthrie's Lectures on the Fourteenth Amendment, page 120 *et seq.*

The considerations which would justify and even require graded classifications in taxation through business licenses, such as were sustained in Clark *v.* Titusville, do not exist in ordinary property taxation. The proportional burden of fixed charges for the privilege of conducting business diminishes as the volume of business increases, and a business tax, which would be trifling in a large business, would be an intolerable burden in a small one. Graded classification therefore, which would be in accord with usual practice in inheritance or license taxation, would, in property taxation, be "of an unusual character" and "unknown to the practice of our government."

§ 452. **Classification by exemption.**

The right of specializing and classifying for taxation obviously includes the right to make reasonable exemptions from taxation. Thus property may be exempted from considerations of public policy, for example, that held for religious, educational and charitable uses, and that which is of so little value in proportion to the amount of the tax to be secured, that it would not justify the expense of assessment and collection. Certain exemptions of this character are customary in systems of taxation, and to these the court refers in the Bell's Gap Railroad case, *supra*, § 439. In many States the right of exemption is controlled by the State constitutions, which in some cases limit, and in other cases distinctly prohibit, legislative exemptions. In the absence of such constitutional restrictions, the right of the State to make exemptions, or contracts for exemption, when it deems them expedient according to its own public policy, has been sustained by the Supreme Court.

In the taxation of occupations, the selection of those which are taxed involves the exemption of others which are not; but it is obvious that the discretion of the taxing power, in the matter of its selection, cannot be reviewed.

Because the State taxes some occupations, it need not tax all; but if it taxes any occupation, it must tax all engaged therein, and it cannot make an arbitrary classification of occupations to be taxed.[1]

In other words, reasonable classification is required in making exemptions from taxation. The right to classify here, as in any other form, must be distinguished from arbitrary discrimination. If the limit of exemptions, $20,000, fixed in the Illinois inheritance tax laws sustained by the Supreme Court in the Magoun case, *supra*, § 449, should be applied in property taxation, it would exempt, in most communities, all but a very few taxpayers, and since such an exemption could only proceed from a purpose to shift the entire burden of government upon a few, it would be a clear violation of the equality of right guaranteed by the Federal Constitution.

This distinction was illustrated in the United States Circuit Court in North Dakota, where it was held, in an opinion by Judge Caldwell, that it was not competent for the State, either under the organic act whereunder it was admitted to the Union, or the Fourteenth Amendment, to classify the lands in the territory for the purposes of taxation into those owned by the railroad companies and those owned by all other persons, and declare that the former should not and the latter should be taxed. The prohibition in the organic act against making "any discrimination in taxing different kinds of property" necessarily implies a prohibition against any discrimination in taxing the same kind of property. The court said, at page 686: "It establishes the just and reasonable rule, which is becoming fundamental in our American system of taxation, that the burdens of taxation shall fall equally upon all owners of the same kind of property."[2] In this case, a corporation

[1] See Anti-Department Store case, *infra*, § 456.

[2] Northern Pac. R. R. Co. *v.* Walker, 47 Fed. Rep. 681. The ex-

claimed its lands were exempt, in other words, claimed a discrimination in its own favor against individuals; but the equality of right enforced by the Constitution applies to all persons, corporate and individual, within the jurisdiction of the State.

But the State may classify railroads for taxation, and apply to them a special method of assessment, *e. g.*, according to their gross earnings,[1] as it may exempt them from taxation altogether, if it deems wise; that is, if it determines that the benefit to be derived from such exemption is equivalent to the tax that would otherwise be exacted, and that the property exempted is used for the promotion of the public welfare.[2] This determination, subject to the restriction of the State constitution, is a legislative and not a judicial question.

§ 453. Exemption for efficiency in taxation.

An interesting illustration of the necessity of apparent discriminations, in adjusting a taxing system to modern conditions, is presented in a Maryland case. A statute of that State subjected to taxation bonds of a corporation held by residents and secured by mortgage upon property wholly within its jurisdiction, but exempted mortgages by individuals and building associations, and the non-interest bearing bonds of corporations. It was held by the highest

emption was held violative of the Fourteenth Amendment, as well as of the organic act of the territory.

[1] Northern Pac. R. R. Co. *v.* Barnes, 2 N. Dak. 310.

[2] See Northern Pac. R. R. Co. *v.* Garland, 5 Mont. 126. It was held, in South Dakota, In re Assessment, 4 So. Dak. 6, that under the State constitution requiring uniformity and equality in taxation, an act permitting the deduction of debts from the amount of credits and personal property, while making no deduction from the value of real estate, was invalid, and also invalid in that it prohibited deductions of debts within the State, but not of debts without the State.

court of the State[1] that these were not arbitrary discriminations, but valid under the Constitution of the State and under the Fourteenth Amendment. The State was not obliged to tax every form of property. An individual's true wealth, for the purposes of taxation, consists of his real and personal property, but in the case of a corporation, its franchises, its borrowing power, its earning power, its real wealth, are not represented merely by its visible property and shares of stock. Its taxable value is its bonded indebtedness together with its stock.[2] There was reason therefore for the exemption. The exemption of non-interest bearing bonds is not arbitrary, but based upon sound reasoning, as the true test of a taxable value is the producing value to the owner. The court held that these are discriminations which the best interests of society require, within the principle laid down by the Supreme Court in the Bell's Gap Railroad case.[3]

§ 454. Conditions which warrant classification.

The conditions of which the courts take notice as warranting classification for taxation are illustrated in a Pennsylvania case,[4] where it was held by the Supreme Court of that State that a constitutional requirement of uniformity upon the same class of subjects was not violated by a statute, which made all interest bearing indebtedness of private corporations a separate class for the purposes of taxation, and required assessment upon their nominal value,

[1] Simpson *v.* Hopkins, 82 Md. 478.

[2] Citing Mr. Justice Miller in the Illinois railroad tax cases, *supra*, § 240.

[3] The report of this case is interesting as showing the relation of law to economics on this subject, as briefs of counsel cite such economic authorities as Professor Seligman and David A. Wells.

[4] Commonwealth of Pennsylvania *v.* Delaware Division Canal Co., 123 Pa. 594, 2 L. R. A. 798.

while all mortgages and money paid by solvent debtors, etc., were taxable at a certain rate upon their value. The court said this classification was justified by the peculiar nature of corporate securities, the great fluctuations in their value and the difficulty of reaching them by a general system of taxation. Classification should be made according to some reasonable practical rule drawn from experience, which would prevent a gross inequality in the burdens of taxation. Absolute equality is, of course, unattainable; a mere approximate equality is all that can reasonably be expected. The mere diversity in the methods of assessment and collection, however if these methods are provided by general law, violates no rule of right, if when these methods are applied the results are practically uniform. If there is a substantial uniformity, however different the procedure, there is a compliance with the constitutional provision; even when there may be some disparity of results, if uniformity is the purpose of the legislature, there is a substantial compliance.

Classification for taxation is not necessarily based upon any essential difference in the nature or condition of the various subjects. It may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods so as to produce just and uniform results, or it may be based upon just and well grounded considerations of public policy.

§ 455. Constitutional amendment held unconstitutional.

While classification may thus be based upon differences in the nature or condition of the subjects of taxation, or their want of adaptability to the same methods of taxation, it must rest on some other reason than that of mere ownership. Thus it was held in Missouri, in a notable case, that while property owned and used by a railroad company

in its equipment as a common carrier can probably be separately classed for taxation, a discrimination excepting all property of every description owned by any *quasi* public corporation and resting upon no other reason than that of mere ownership is a discrimination violative of the Fourteenth Amendment.[1] The case is an interesting one, as it involved the decision that a constitutional amendment adopted in that State for the taxation of mortgages was invalid. The amendment was substantially copied from the California constitution and was adopted at the general election in November, 1900. It provided that a mortgage should be taxable as an interest in the property affected thereby, "except as to railroads and other *quasi* public corporations for which provision has already been made by law."

This method of taxing mortgages had been held not violative of the Constitution of the United States in Savings Society *v.* Multnomah County, a case from Washington.[2] The exception of railroads and other *quasi* public corporations from the provisions of the act was held by Justices Field and Sawyer in the United States Circuit Court in the case of the Southern Pacific Railroad Company [3] to be an unlawful discrimination, but it was suggested by Mr. Justice Field in his opinion,[4] that the constitutional provision of California could be sustained by eliminating the exception. The judgment in this case invalidating the assessment complained of was affirmed by the Supreme Court[5] on another ground, and the point in question has never been decided by that court, although it has upheld,

[1] Russell *v.* Croy, 164 Mo. 69, opinion by Valliant, J., three judges dissenting.

[2] *Supra*, § 401.

[3] *Supra*, § 310 *et seq.*

[4] See page 414.

[5] 118 U. S. 394.

as stated, the power of the States to tax mortgages as real estate.

The court said that the discrimination in excepting railroad and other *quasi* public corporations was not in accord with the uniformity and equality in taxation required by the State constitution, but that, of course, that was no legal objection to its validity as a constitutional amendment, "as the very purpose of the amendment is to make some change in the original." But it was also violative of the equal protection of the laws secured by the Fourteenth Amendment.

It was admitted that the State could classify property for taxation, but it was said that the classification must rest on some reason other than mere ownership, and that different pieces of property of the same kind held or used for the same purposes within the same jurisdiction could not lawfully be so classified, as that one is subject to the tax and the other exempt, merely because one belongs to a natural person and the other to a corporation, or that one is the obligation of a corporation and the other that of a natural person, or one that of a large concern and the other that of a small one. The words of the exception were applicable to all mortgaged property of every class owned by railroads or other *quasi* public corporations, and the discrimination put mortgage securities issued by these corporations in a position of advantage over such securities made by individuals, so that the money lender could afford to lend his money to a *quasi* public corporation at a less rate of interest than to others. The court also cited and quoted from the opinion of the United States Circuit Court in the Northern Pacific Railroad case,[1] and the opinion of Mr. Justice Field in the Southern Pacific Railroad case, also from Mr. Guthrie on the Fourteenth Amendment, as follows:[2]

[1] *Supra*, § 452.

[2] Pp. 117, 118.

"Indeed, in one of the early cases, the extreme statement was made that 'the Federal Constitution imposes no restraints on the States' in regard to unequal taxation.[1] If this language means that the amendment does not prohibit legitimate classification, and that it does not require all kinds of property to be taxed at the same rate, the statement is correct. Certain kinds of property and certain classes of persons can be singled out for taxation, even though this may result in exempting other property and other classes from any tax burden. But the statement is too broad, and is misleading. Unequal taxes may not be imposed upon property of the same kind, in the same condition and used for the same purposes. 'Equality is of the very essence of the taxing power itself.' The Fourteenth Amendment does impose a practical and effective restraint against such taxes."

The constitutional amendment was therefore declared void,[2] as violative of the Fourteenth Amendment.

§ 456. Anti Department Store Act held unconstitutional.

Another decision of the Supreme Court of Missouri declared invalid another example of illegitimate classification for taxation.[3] This act imposed a license of not less than $300 nor more than $500 for each of the classes or groups of goods sold by each merchant employing more than fifteen persons. It was declared invalid on other grounds, but also because it was unwarranted class legislation, violative of the natural rights of the citizen. The court based its decision principally upon the provisions of the Missouri Bill of Rights, that all persons have a natural right to life, liberty and the

[1] Justice Miller in Davidson *v.* New Orleans, *Supra*, § 360.

[2] For decision of the United States Circuit Court of Oregon in relation to the same system of taxing mortgages, see Dundee Mortgage & Trust Co. *v.* Parrish, 24 Fed. Rep. 197.

[3] State ex rel. *v.* Ashbrook, 154 Mo. 375.

enjoyment of the gains of their industry, and that no person shall be deprived of life, liberty or property without due process of law, and said that the classification in the act was wholly without reason or necessity, and was truly "classification run wild." The court said "to have made the act apply to all merchants of a given avoirdupois or to those employing clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification for the purpose in view, as the classification made by this act."

§ 457. Taxation of employers of foreign born persons held invalid.

Both the Supreme Court of Pennsylvania and the United States Circuit Court in that State held invalid an act of its legislature, imposing on employers of foreign born unnaturalized male persons over twenty-one years of age a tax of three cents a day for each day that each of such persons should be employed, and authorizing the deduction of that sum from their wages. It was held by both tribunals that this act deprived the employees of the equal protection of the laws, in violation of the Fourteenth Amendment.[1] The former court said, and its language was quoted by the latter: "It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis for taxation, which is lacking here. The tax is of an unusual character and is directed against and confined to a particular class of persons. Evidently the act is intended to hinder the employment of foreign-born, unnaturalized persons over twenty-one years of age. The act is hostile to and discriminates against such persons.

[1] Fraser *v.* McConway, 82 Fed. Rep. 257; Juniata Limestone Co. *v.* Fagley, 187 Pa. St. 193, 42 L. R. A. 442.

It interposes to the pursuit by them of their lawful avocation, obstacles to which others in like circumstances are not subjected. It imposes upon those persons burdens, which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of persons. The equal protection of the laws declared by the Fourteenth Amendment to the Constitution, secures to each person within the jurisdiction of a State exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances."

The Supreme Court of Pennsylvania held that the act was not only violative of the Federal Constitution, but also of the State constitution, which provided that all taxes should be uniform upon the same class of subjects.

§ 458. Discriminations between residents and non-residents.

Any form of discrimination in taxation in favor of residents and against non-residents is void, not only on the ground already considered,[1] that such discrimination is an interference with interstate commerce and violates the privileges and immunities of citizens of other States,[2] but on the further ground that such classification in taxation is unreasonable and violative of equality and uniformity, and of the equal protection of the laws.

In a Vermont case,[3] this principle was applied to a discrimination in favor of non-residents, that is, of goods not manufactured in the State.

[1] *Supra*, Chapter IV.

[2] See Beeson *v.* Johns, 124 U. S. 56. The discrimination in this case was claimed to violate the ordinance of 1787, and the act of admission of Iowa into the Union (as to these claims see § 191, *supra*). The court held that the evidence did not show any discrimination against non-residents as such.

[3] State *v.* Hoyt, 71 Vt. 59.

The statute which imposed a tax upon peddlers selling goods, which were the manufacture of the State, was held to effect a discrimination in favor of foreign goods and to be therefore a denial to persons "within its jurisdiction of the equal protection of the laws." The court said that the question was one of classification, and that it must appear in every such case that the classification is based on some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and not a mere arbitrary selection.[1] Applying this rule, there was no sufficient ground in this case. "It cannot be based on any difference in the goods themselves, for they are precisely alike; nor on the fact that they were made in different States, for that bears no just and proper relation to a classification, but is purely arbitrary. It cannot be based on public policy; for it is not reasonable to say that it is for our interest to encourage the introduction and sale of the goods of the non-resident manufacturer, when thereby the manufacture and sale of the goods of the resident manufacturer would be discouraged, and perhaps prevented altogether. Nor can it be based on the difference of residence of the manufacturers; for that, as in case of the goods, would be purely arbitrary, and, besides, would allow a State to discriminate against its own citizens in favor of the citizens of other States which it cannot do any more than it can discriminate in favor of its own citizens against the citizens of other States, for the equality clause of said amendment includes everybody. No State shall 'deny to any person within its jurisdiction the equal protection of the laws' is its language, and its universality of inclusion has been often adjudged. Yick Wo *v.* Hopkins,

[1] It was held in Cribbs *v.* Benedict, 64 Ark. 555, that the difference in manner of enforcement of a ditch tax, between residents and non-residents, the tax being the same in amount and a lien on the land in both cases, was not an unreasonable discrimination.

118 U. S. 356, 369. If a classification can be based on none of these grounds, we see no ground on which it can be based."[1]

§ 459. Illegal discrimination in license taxation.

While the State may classify for the purposes of license taxation, that is, taxation upon business or occupations, and may thus tax one business without taxing another, it cannot make a classification which is arbitrary and has no just and reasonable basis. This was illustrated in the Anti-Department Store Case, *supra*, § 456. Where a license tax is imposed upon those of a certain business, it must be levied without discrimination upon all engaged therein, within the authority levying the tax. This is essential in order that the tax may be equal and uniform as required by the State constitutions, as well as under the provision for equal protection of the laws. In the language of the Supreme Court in the Illinois inheritance tax case, *supra*, § 449 the rule (of the Fourteenth Amendment), is not a substitute for municipal law; it only prescribes that the law have the attribute of equality of operation, and equality of opera-

[1] In Gilman *v.* Sheboygan, 2 Black 510, the court followed the Supreme Court of Wisconsin, holding that under the constitution of that State a tax upon "all the real estate" of the city for the payment of a railroad subscription was an illegal discrimination, there being some three or four hundred thousand dollars of personal property in the city subject to taxation.

For other illustrations of classifications adjudged illegal, see State *v.* Hubbard, 12 Ohio Dec. 87, holding that taxation of teachers as a class of citizens, for the purpose of raising a Teachers' Pension Fund, was void. An act dividing the counties of the State into classes and the lands thereof into sub-classes according to quality, fixing a maximum and minimum value for taxation of the lands in the several classes, and confining the assessor to the limits so fixed, was held violative of uniformity and equality in taxation. Hawkins *v.* Mangum, 78 Miss. 97. Also State *v.* Benzenberg, 101 Wis. 172; State *v.* Gardner (Ohio), 51 N. E. 136; Walsh *v.* Denver, 11 Colo. App. 523; State *v.* Willingham (Wyo.), 62 Pac. Rep. 797, 9 Wyoming 290.

tion does not mean indiscriminate operation on persons as such, but on persons according to their relations. In some circumstances it cannot tax A more than B, but if A be of a different trade or profession than B, it may.

In North Carolina a license of a thousand dollars charged upon the occupation of an emigrant agent, unaccompanied by any police regulation, was held void as violative of the principle of uniformity, which, under the constitution of that State, prohibited any discriminating tax upon persons pursuing the same vocation. The decision was based upon the ground that there was no regulation prescribed in the act, and that it was an arbitrary and unreasonable exercise of the taxing power.[1]

Reasonable classifications for taxation however, such as between wholesale and retail merchants,[2] between manufacturing and *quasi* public corporations and other corporations,[3] between gas companies and other manufacturing companies,[4] have been sustained, as also, in numerous cases, have license charges upon all those engaged in a certain business. But on the other hand, discriminations between members of the same natural class have been uniformly condemned. Thus discriminations between commission merchants and produce dealers,[5] in license taxation according to the residence of a party,[6] and between merchants doing business in different parts of a city,[7] have been held void as violative of the principle of uniformity and equality,

[1] North Carolina *v.* Moore, 113 N. Car. 697, and 22 L. R. A. 472. The act also lacked uniformity in that it expressly excluded from its operation all counties lying west of a certain line.

[2] Commonwealth *v.* Clark, 195 Pa. St. 634.

[3] Carroll *v.* Alsup (Tenn.), 64 S. W. Rep. 193. See also Commonwealth *v.* Edgerton Coal Co., 164 Pa. St. 284.

[4] Williams *v.* Reese, 2 Fed. Rep. 882.

[5] Kansas City *v.* Grush, 151 Mo. 128.

[6] St. Louis *v.* Consolidated Coal Co., 113 Mo. 83.

[7] St. Louis *v.* Spiegel, 75 Mo. 145; St. Louis *v.* Spiegel, 90 Mo. 587.

as between members of the same natural class. A poll tax, exempting persons who had voted at the last election, was held an unreasonable classification and void.[1] A peddler's license tax, exempting persons, who had served in the army or navy, was also held void.[2]

But the Fourteenth Amendment, while securing to all persons in the pursuit of a lawful business the equal protection of the laws, is not to be construed as restricting the State in the exercise of its power to charge its citizens with the burdens of taxation, differing in their imposition according to the manner in which the avocation of the citizen touches and concerns the public interests. Thus, in New York, a license fee upon the entire class of persons acting within the State as agents for associations of individual fire underwriters not incorporated under the laws of the State, while the agents of domestic fire insurance corporations were not subject thereto, was held not to involve the unequal application of a tax.[3]

The regulation of the liquor traffic, or of any other calling or business which is of such a nature that it may fairly be deemed to be subject to police prohibition or regulation, obviously rests on different grounds, and the same State law may authorize both regulation and taxation.[4]

Thus the statute of Texas, requiring a license and bond and the payment of an occupation tax as conditions of the right to sell liquors, was sustained by the Supreme Court, although there was no such requirement as to any other occupation.[5] The court said the statute affected all

[1] Kansas City *v.* Whipple, 136 Mo. 475.

[2] State *v.* Garbrouski, 111 Iowa 496.

[3] Fire Department of New York City *v.* Stanton, 159 N. Y. 225; see also State *v.* French, 17 Mont. 54; Hayes *v.* Commonwealth, 55 S W. Rep. 425; Kinsley *v.* Cottrell, 196 Pa. St. 614; Singer Manufacturing Co. *v.* Wright, 33 Fed. Rep. 121.

[4] Gundling *v.* Chicago, *supra*, § 412.

[5] Giozza *v.* Tiernan, 148 U. S. 657.

persons in Texas engaged in the sale of liquors, exacted compliance in the same manner and to the same degree, and did not therefore violate the Fourteenth Amendment.[1]

§ 460. **Discrimination in expenditure of public funds.**

The equal protection of the laws under the Fourteenth Amendment prohibits unjust discrimination not only in taxation, but also in the expenditure of the proceeds of taxation. It is obvious however that a very clear case must be presented, to justify the judiciary in interfering with the very large discretion which is reposed in the legislative department in expending, under the limitations of the State constitution, the public funds for the public needs.

This principle was applied by the United States Circuit Court in Kentucky, in granting an injunction against a Board of Trustees of Public Schools, in behalf of certain colored citizens, on the ground of discrimination in the distribution of school funds.[2] The act of the legislature authorized the municipality to levy a tax for the benefit of the public schools within its limits, but directed that the taxes collected from the white people should be used to sustain the schools for white children only, and that those collected from the colored people should go to support the schools for the colored children. The effect of this discrimination was to give to the whites excellent school facilities and a school session annually of nine months, and to the colored children inferior school facilities and an annual session of only three months. The court said that this was a discrimination under State authority constituting a denial of the equal protection of the laws. In answer to

[1] See also Humes *v.* Ft. Smith, 93 Fed. Rep. 857, from Arkansas; Daniels *v.* State, 150 Ind. 348; Strouse *v.* Galesburg, 89 Ill. App. 504; In re Eberly, 98 Fed. Rep. 295.

[2] Claybrook *v.* City of Owensboro, 16 Fed. Rep. 297.

the argument that the equal *protection* does not mean the equal *benefit* of the laws, the Court said that on that basis the State could apply taxes not only according to color, but also according to the nativity of citizens, and that a division might be made limiting the benefit and distributing the protection of the laws according to the taxes paid and the wealth of the taxpayer. This would entirely ignore the spirit of our republican institutions. The court added at page 302 : —

"The equal protection of the laws guaranteed by this amendment must and can only mean that the laws of the States must be equal in their benefit as well as equal in their burdens, and that less would not be the equal protection of the laws. This does not mean absolute equality in distributing the benefits of taxation. This is impracticable; but it does mean the distribution of the benefits upon some fair and equal classification or basis." The court quoted the language of the Supreme Court of California : [1] "'To declare, then, that each person within the jurisdiction of the State shall enjoy the equal protection of its laws, is necessarily to declare that the measure of legal rights within the State shall be equal and uniform, and the same for all persons found therein, according to the respective conditions of each — each child as to all other children, each adult person as to all other adult persons.'"

On final hearing of this case,[2] it was held that the court had no power to issue a mandatory injunction, requiring the distribution of the money raised by taxation for public schools regardless of the discriminations prescribed by the act, and could only enjoin persons from acting under authority of the act.

[1] In Ward *v.* Flood, 48 Cal. 51.

[2] 23 Fed. Rep. 634.

§ 461. Discrimination between races in expenditure of school funds.

The same question came before the Supreme Court of the United States in another case presenting a materially different question. The Board of Education in Richmond County, Georgia, suspended the high school for negroes, but continued to maintain one for white children. Suit was brought to compel the closing of the high school for the whites, on the ground that its maintenance when the other was closed was a discrimination against the colored race in violation of the rights secured to them under the Fourteenth Amendment. The constitution of Georgia provided for free and separate schools. The State court did not deem the action of the board in suspending temporarily and for economic reasons the high school for the colored children a sufficient reason for closing that for the whites, and said there was no evidence that the board had acted in bad faith, or that it had abused its discretion.[1] The Supreme Court said that under the circumstances it could not see that this action of the State court was, within the meaning of the Fourteenth Amendment, a denial of the equal protection of the laws to plaintiffs; adding that "while all admit

[1] Cumming *v.* Board of Education, 175 U. S. 538. Held, by the New York Ct. of App., 93 N. Y. 438, People ex rel. *v.* Gallagher, that separate public schools being provided for colored children, such children may be excluded from those provided for white children, and that this involved no denial of rights under the Fourteenth Amendment. Attention was called to the fact that Congress had established exclusive schools for the education of the colored race in the District of Columbia. The amendment was not intended to have any other effect than to give to all, without respect to color, age or sex, the same legal rights and the uniform protection of the same laws.

Held, in North Carolina, Markham *v.* Manning, 96 N. C. 132, that a law which directed that the funds raised by taxation from the property of whites should be devoted to the schools of white children, and those raised from the property of negroes should be devoted to schools for negroes, was unconstitutional and void. See United States *v.* Buntin, 10 Fed. Rep. 730 and cases cited in note.

that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in the schools maintained by State taxation is a matter belonging to the respective States, and any interference on the part of the Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

It seems that in this case the board had not established a high school for white boys, but only for white girls. The court said that the colored school children of the county would not be advanced in the matter of their education by a decree compelling the board to cease giving support to the white high school, that its decision was in the interest of the greater number of the colored children who attended the primary schools, and that the small number wanting a high-school education could obtain it in the existing private institutions at an expense not beyond that incurred in the high school discontinued by the board.

In a Kansas case,[1] an act providing for the levy of a fire tax which excluded the property of railroad companies, whereon the tax was levied, from the benefit and protection of the proceeds thereof, was held invalid, the court saying: —

"As some of the taxpayers appear to have been purposely excluded from the benefit and protection of the law, the tax, therefore, lacks that equality and uniformity essential to its validity. It is a discrimination against one taxpayer in favor of others, and is a denial of the equal protection of the law required by both State and Federal constitutions. Absolute equality in taxation is, of course, unattainable, but a law, the manifest purpose and legitimate

[1] A. T. & S. F. R. Co. v. Clark, 60 Kansas 826.

result of which is discrimination and inequality, cannot be sustained."

§ 462. Federal and State guaranties of equal taxation.

The Fourteenth Amendment in this guaranty of the equal protection of the laws confers no right, except that of invoking the Federal power against illegal discriminations under State authority. Equal protection of the laws as construed by the Supreme Court does not require an iron rule of equality in taxation, but does require that uniformity and equality as to the same class of subjects by due apportionment which are inherent in taxation, as distinguished from arbitrary exaction. A State has the right to determine according to its own considerations of public policy what subjects shall be taxed and what reasonable classification shall be made in distributing the burdens of taxation, provided that the classification is natural and reasonable and not arbitrary and oppressive. What is natural and reasonable on the one hand, or arbitrary and oppressive on the other, must be determined from the circumstances of each case, as from the nature of things no definite rule can be formulated.

It will be seen however from the opinions of the Supreme Court and the several State courts in which the question has been discussed, that the latter tribunals have been disposed to give a stricter construction to State constitutional provisions requiring equality and uniformity in taxation than the Supreme Court has given to this clause of the Fourteenth Amendment as a restraint upon the State power of taxation. Thus in the matter of inheritance taxation, the Supreme Court held valid under the Fourteenth Amendment a progressive tax which had been held invalid in certain State courts as violative of equality and uniformity in their respective constitutions. This disposition of the State courts to enforce strictly their own constitutional re-

straints may in part at least account for the fact that in no case has the Supreme Court held a State tax violative of the equal protection of the laws guaranteed by the Fourteenth Amendment. The very existence however of this Federal guaranty, conservative as the Supreme Court has been in its enforcement, is doubtless a protection against the discriminating exercise of the taxing power.[1]

[1] The subject of classification was thoroughly considered in a recent case in Indiana, State ex rel. *v.* Smith, 63 N. E. Rep. 25 and 214, decided February 27, 1902, where the court, two judges dissenting, sustained, as a valid classification under the State constitution requiring a uniform rate of taxation, and also under the Fourteenth Amendment, an act allowing deduction from the assessed value of real estate of mortgage indebtedness to the amount of $700, no deduction being allowed greater than one-half of the assessed value of the real estate.

CHAPTER XVI.

EQUAL PROTECTION OF THE LAWS IN THE VALUATION OF PROPERTY.

§ 463. Inequality in taxation through inequality of valuation.
464. Inequality of valuation from error of judgment.
465. Inequality through unequal local assessments.
466. Fraudulent valuation in assessments.
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474. Collection on excessive valuation enjoined.
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476. Chicago franchise tax cases.
477. Valuation by capitalization of net earnings.
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§ 463. Inequality in taxation through inequality of valuation.

The Federal guaranty of equal protection of the laws has been invoked to remedy another form of discrimination, growing out of habitual and intentional inequality in the valuation of property for taxation. It is obvious that, where taxation is upon property that requires valuation, inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax. This was declared by the Supreme Court in construing the Act of Congress, providing that State taxation upon the shares of the national banks should not be at a greater rate than is assessed on other moneyed capital.[1] The court said that Congress had

[1] *Supra*, § 292.

in mind an assessment, a rate of assessment, and valuation, and taking all these together the taxation on these shares was not to be greater than on other moneyed capital. Congress therefore, in prohibiting discrimination in taxation against national banks, prohibited discriminations in the valuation of bank shares. The principle thus applied in enforcing equality in the taxation of national bank shares has been applied to discriminations in the taxation of other property, effected through inequality of valuation producing inequality in taxation under the same rate of taxation. This discriminating inequality, when habitual and intentional, has been declared violative of both the equality and uniformity guaranteed by State constitutions, and also of the equal protection of the laws guaranteed by the Federal Constitution.

It is obviously immaterial what the basis of valuation is, if it is uniform as to all property within the territory or as to the class of subjects upon which the tax is laid. This is recognized in the requirement of State constitutions, that taxation shall be uniform upon the same class of subjects within the territorial limits of the authority imposing it. Thus, if all the property in the State were valued on the same basis, it would be immaterial to the individual taxpayer whether he paid one per cent on a valuation of one hundred cents, or two per cent on a valuation of fifty cents, or four per cent on a valuation of twenty-five cents. If there were no general property tax levied by the State, based upon valuation, it would make no difference whether property in one town or county was valued on a higher basis than property in another. But within the territory wherein the tax is levied, as in the State at large wherein the State tax upon property is levied throughout its jurisdiction, inequality of taxation results as certainly from inequality of valuation as from inequality in the tax rate. The failure to recognize this fundamental principle in tax-

ation oftentimes makes it misleading to compare for illustration the taxing rates of different States or communities, as it is impossible to compare the burden of taxation in different communities, unless we have both the essential factors of the problem, the rate of the valuation and the rate of the tax.[1]

§ 464. Inequality of valuation from error of judgment.

This inequality of valuation may exist when the design on the part of the assessors is honest, and there is no intentional discrimination. There are inevitable inequalities in valuation growing out of the errors and infirmities of human judgment. The Supreme Court has said that "perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream."[2]

The influences which affect the salable values of property are variable and often complicated. Thus it has been said[3] that the differences between assessors on questions of valuation of the same class of property are no greater than frequently arise between witnesses in a trial on questions of value. There is no certain, definite standard of values, excepting of money and standard marketable articles. Many influences, tangible and intangible, affect the salable value of property, real and personal, both in city and country, so as to make its real valuation a work of great difficulty and resulting in inevitable inequalities. It is for the purpose therefore of remedying as far as practicable these inevita-

[1] Thus in Illinois the constitution provides for a tax in proportion to value, and the statute directs the valuation of property at its "fair cash value," one-fifth or twenty per cent of which is taken as the assessed value for taxation. R. S. 1901, § 312. In Iowa the statutory basis is twenty-five per cent of "actual value," R. S. 1897, § 1305.

[2] Justice Miller in the Head Money Cases, 112 U. S. 595.

[3] *Supra*, § 295.

ble inequalities growing out of the honest but mistaken judgment of assessors, that special tribunals are provided for the equalization of values, and as a rule inequalities not involving intentional discrimination can only be remedied in such tribunals.[1]

§ 465. Inequality through unequal local assessments.

These inevitable and, as a rule, irremediable inequalities in taxation are in many cases grossly aggravated by intentional lowering or raising of the rate of valuation by local assessments in response to local needs or local public opinion. In many States the maximum tax rate of municipalities or counties is limited by the constitution or statutes, so that a higher rate of valuation is enforced in order to raise the revenues for municipal or local expenses, while, in counties where there is no such need for revenue, valuations are made at a lower rate; so that the State tax is levied upon property in cities at a higher rate of valuation than it is upon other property in the State, thus making an inequality of taxation as between different parts of the State.[2] Some of the States have attempted to remedy these admitted inequalities, growing out of the action of local assessors influenced by local considerations, through a State Board of Equalization, vested with power to equalize these local valuations as to the different classes of property. This method of redress however has proven inadequate to remedy the evil, and it is believed that the only effectual cure will be to separate the sources of municipal and State revenue. If that is effected, the inequality in valuation between the local subdivisions of the State

[1] In some States, as in New York, inequalities in values may be reviewed by the courts on writ of *certiorari*.

[2] In some States county assessors are reported to have been elected on the platform of lowering the county assessments.

would be immaterial, as no common tax would be levied thereon.[1]

§ 466. **Fraudulent valuation in assessments.**

Assessors act in a semi-judicial capacity, and, as a rule, their judgments are only reviewable in special tribunals established by the State for that purpose, so far as errors of judgment in valuation are concerned. These, like all judgments, may be vacated for fraud in direct proceedings, but the fraud must be clearly established.[2] Accordingly an invidious assessment, made unequal and oppressive through intentional unfairness of valuation, will be set aside. Thus the Supreme Court of Michigan, in an opinion by Judge Cooley, held that a bill was not demurrable, which alleged that an assessment was fraudulently made above the real value of the property and relatively much above other property. Later,[3] the same court applied this principle to a case where a fraudulent undervaluation of certain property was alleged which resulted in the increase of plaintiff's assessment, and the court held that the plaintiff was entitled to a reduction to the extent that his assessment was increased by reason of such fraudulent

[1] The experience of Missouri in this regard is interesting, as it is fairly typical of other States in this matter. From a careful investigation made a few years since, it was found that the rate of assessments varied in the State from 20% to 80% of the full value, the average assessment of farm lands being about 35%. In St. Louis, real estate was assessed at 70%, while money and securities, when discovered by the assessor (mainly in the Probate Court), were assessed at 100%. The only effectual equalizing by the State Board of Equalization was in the case of banks and trust companies, which had been locally assessed in the different cities and counties all the way from 38% to 100%, and the State Board fixed an equalized value at 63%. The equalizing of general property valuations was found impossible. See writer's "Taxation in Missouri," Chapter XVI.

[2] Merrill *v.* Humphrey, 24 Mich. 170.

[3] Walsh *v.* King, 74 Mich. 350.

valuation. It said: "We cannot agree with the authorities cited by defendant to sustain the position that a willful or intentional violation of the law, by the omission of property from assessment or its deliberate undervaluation, must be treated the same in equity, as regards the assessment and valuation of property for taxation, as an accidental omission or an honest mistake in judgment because the result is the same in both cases. Fraud is ever open to remedy in a court of equity, and there can exist no good reason why relief against fraud in taxation, which in the end deprives a man of his property without due process of law, cannot be granted as well as against any other fraud." [1]

§ 467. Discrimination by undervaluation of other property.

The proof of such fraudulent undervaluation, which would warrant a court in setting aside an assessment, is rarely obtainable. The real difficulty, which is widely prevalent, arises not from discrimination by intentional overvaluation, that is, by valuing property at more than the true value, but by the undervaluation of other property. This may not be fraudulent in the sense that it proceeds from a corrupt motive on the part of the assessor, but it is intentional, and, when it is habitual, as it often is, it operates as an effective discrimination. This discrimination may be effected, although the property of the party discriminated against may also be valued at less than its true value, through the greater undervaluation of other

[1] See also Pacific Postal Telegraph Cable Co. *v.* Dalton, 119 Cal. 604, holding that a taxpayer may enjoin the collection of a tax founded upon assessments fraudulently and corruptly made with intention of discriminating against him, and for the purpose of causing him to pay more than his just share of taxes, but not for mere error in judgment. See also Hersey *v.* Supervisors, 16 Wis. 185, where an intentional omission was held to avoid an assessment.

property. It is the relative valuation of property which constitutes discrimination. Thus, if the property of one taxpayer or class of taxpayers is valued at eighty per cent of the full value, while all other property subject to the same tax is valued at forty per cent, there is as clear and effective a discrimination, as if the assessment of the former had been above the true value and all other assessments at the true value.

§ 468. Dilemma of courts in remedying unequal valuations.

The courts of some of the States have found a difficulty in remedying this form of discrimination in taxation, as such remedy would involve the judicial recognition of the practice of undervaluing property in violation of the constitutional or statutory requirement, that all property should be assessed at its full or cash value. This requirement is differently phrased in the constitutions or statutes as "full value," "cash value," or "fair cash value." Not only is it presumed that assessors perform their official duty and do not violate their official oaths, but these courts have found it difficult to relieve disproportionate taxation by directing a reassessment or a reduction of an assessment below the "full value" directed by the constitution or statute of the State.

Thus it was said by the Supreme Court of *Massachusetts*:[1] "Whatever may be the remedy, if there be any, when it is shown that the assessors have intentionally assessed the property of a part or all of the inhabitants at less than its fair cash value, we are of opinion that, in a petition for the abatement of taxes on the ground of the overvaluation of the property of the petitioner, and the disproportionate taxation arising from such overvalua-

[1] Lowell *v.* Co. Commissioners, 152 Mass. 375.

tion, the question is, whether the property has been valued at more than its fair cash value, and not whether it has been valued relatively more or less than similar property of other persons." [1]

Also in *New Jersey*,[2] where it was claimed that the State Board had assessed corporate property at its "true value" and local assessors had assessed other property "at much below its true value," the court said that the argument that the State Board should be compelled to pursue the same forbidden course had no force whatever.

In an *Ohio* case,[3] the court said that a gross, if not scandalous, inequality existed between the burdens of taxation cast upon bank shares and those imposed upon other property in the county. But it said that the blame attached to the officers of the law and not to the law itself, and that, to reduce plaintiff's assessment from eighty per cent, its value fixed by the assessor, to the forty per cent at which other property was valued, would put an additional wrong upon the other counties of the State where property was presumably valued for State purposes at the full value prescribed by the statute.[4]

§ 469. Habitual and intentional violation of assessor's duty must be proved.

The presumption, on which these decisions of the State

[1] This was the case of a manufacturing company, and it was held that the evidence of what other manufacturing property was valued at was admissible only as a possible assistance in determining the cash value of the property in question, as that and not the proportionate value was in issue.

[2] Central Railroad Company *v.* Assessors, 48 N. J. L. 1, decided in 1886.

[3] Wagoner *v.* Loomis, 37 Ohio St. 571.

[4] This case is an interesting illustration of the injustice and effectual inequality enforced through the presumption that officers of the law do their duty, when it is notorious that they do not.

courts are based, that assessors sworn to assess property at its true value or true cash value perform their official duty, has been recognized and applied by the Supreme Court, where discriminations through undervaluations of other property were claimed as a denial of the equal protection of the laws under the Fourteenth Amendment. That court has therefore held that such undervaluation cannot be presumed, but must be distinctly alleged and proved. In this case the New York Court of Appeals said [1] that, while it was generally understood that in many localities throughout the States assessors, in violation of their duties, valued real estate at less than its actual value, the court could not assume without proof that there had been such undervaluation in the city of New York, which was the place where the assessment was complained of. In the Supreme Court,[2] reliance was placed upon the expressions in the opinion in Cummings *v.* National Bank [3] as to the notoriety of the practice of undervaluation by assessors. But the court said that in that case the bill alleged the fact of undervaluation and the testimony supported the allegation, and added: —

"Although the justice who wrote the opinion did speak of the fact as matter of common observation, neither he nor the court took judicial notice thereof, but only those facts which had been pleaded and testimony to sustain which had been duly given formed the basis of judicial action. We will not and ought not to presume a violation in the absence of allegations and proofs to that effect."

The court said that there was no allegation in the petition for *certiorari* that the laws of the State provided for an undervaluation of property, either with regard to individuals or corporations, but on the contrary it was therein

[1] People ex rel. *v.* Barker, 146 N. Y. 304.
[2] New York State *v.* Barker, 179 U. S. 279.
[3] 101 U. S. 153.

asserted that the assessed valuation of the real estate was its actual value, and the whole force of the plaintiff's contention was based upon the fact of undervaluation, although it was in the teeth of the statute and in plain violation of its provisions. In order to raise the question of the denial of equal protection of the laws, it was obviously necessary, the court said, to allege and prove that there was habitual violation of the law by undervaluation; that the assessors habitually and intentionally, or by some rule prescribed by themselves or by some one whom they were bound to obey, undervalued real estate by assessment in New York City, and that such rule had been applied, not solely to one individual, but to a large class of individuals or corporations. The court said, further, that this was the effect of the ruling in the National Bank Cases, where the court had enforced the Act of Congress prohibiting discrimination against national bank shares. Whether the facts assumed by counsel, as to the undervaluation of real estate held by individuals as compared with corporate property, would amount to such a discrimination against corporations as to work a denial of the equal protection of the laws, was a question not raised by the record and not necessary to be decided.[1]

The rule established in the National Bank Cases against discriminating taxation in violation of the National Banking Act has not as yet been applied by the Supreme Court to a similar discrimination in the taxation of other prop-

[1] This presumption that assessors perform their duty was recently applied in Missouri, where it was held, State ex rel. *v.* Western Union Tel. Co., 165 Mo. 502, that the testimony of one member of the State Board of Equalization, that, in his judgment, the valuation put upon property generally was only 35 to 40 per cent of its true value, was insufficient to overcome the presumption that the officers did their duty in assessing property at its true value in money as required by the statute. This testimony was held insufficient to convict the local assessors of systematic and intentional violation of duty.

erty, as being a denial of the equal protection of the laws under the Fourteenth Amendment;[1] that is, a case has not yet been presented where the facts sustain the allegation that there was an intentional and habitual discrimination in valuations, under the rule declared in the National Bank Cases and in the case above cited.

§ 470. Relief against discriminating assessments in State courts.

Equality in taxation, that is, equality as to the same class of subjects upon which the tax is levied, both in the tax rate and in the valuation of property, is not only guaranteed by the provisions of many State constitutions, but is inherent in taxation as distinguished from arbitrary exaction. Equality in this sense therefore, as already shown, is equivalent to the equal protection of the laws under the Fourteenth Amendment. When cases of discrimination in assessments through undervaluations are presented to the State courts, they are confronted with the dilemma whether they should give effect to the paramount intent inherent in taxation, whether specifically declared in the State constitution or not, that taxes shall be equally levied, or whether they should disregard that intent and deny relief, because of the statutory requirement that all property shall be assessed at its cash value.

Several State courts have taken the former course and granted relief where the complainant's property was assessed at less than the true value, but at a higher rate than other property in the same jurisdiction. Thus in Connecticut,[2]

[1] It was held in Alburquerque Bank *v.* Perea, 147 U. S. 87, that a plaintiff could not complain of the underassessment of other property, when his own property was also assessed below the required "cash value," without proof of *design* on the part of officials.

[2] Randell *v.* City of Bridgeport, 63 Conn. 321.

where there was no direct constitutional requirement of equal taxation, the statute required that property should be assessed at its full market value. Plaintiff's property was so assessed, contrary however, as was shown, to the practice of the assessing board, which regularly assessed property at one-half of its market value. The complainant was declared entitled to an assessment according to the uniform rule, in the face of the mandatory provision of the statute that all property should be assessed at its true market value, the court saying:—

"There are two ways in which a taxpayer may be wronged in levying taxes: An assesment may conform to the statute generally, and the individual may be assessed in excess of the statutory requirement. A wrong of that description is easily redressed. But when the town disregards the statute, and establishes a rule of its own, assessing the property at one-half of its actual value, and then assesses an individual at the full value of the property, while the injury is the same, the application of the remedy becomes more complicated. Practically, the only way to redress the wrong is to reduce the assessment, and that makes the court seem to disregard the statute, while, if the wrong is not redressed, there is a denial of justice, and the court practically ignores the statute giving an aggrieved party an appeal, and practically ignores the statute which provides that 'said court shall have power to grant such relief as shall to justice and equity appertain.' Thus we are in a dilemma. If we choose one horn of it, a public statute is violated, not so much by the court as by the town, but by an apparent approval of the court as to one individual, and that by an express command of another statute, and by the dictates of justice. If we take the other horn, the court itself violates a remedial statute, and becomes in a measure a party to the wrong-doing. Under

the circumstances, we do not hesitate to choose the former, and to redress the wrong."[1]

In *Arkansas*,[2] the assessment of a bridge was reduced to fifty per cent of its actual value because this appeared to be the regular rate of valuation assessed upon all realty in the county, although the statute on the subject provided that property should be assessed at its "true market value in money." The court said: —

"It may be said that, inasmuch as its property was not assessed above its true value, it had no right to complain. But this is not true. It had the right to demand that no unequal burden be imposed upon it by taxation. The duty to contribute to the support of the State government by the payment of taxes is imposed upon all persons owning property subject to taxation. The Constitution provides that this burden shall be apportioned among them according to the value of their property, to be ascertained as directed by law. When, therefore, the property of a few is taxed according to its value, and of all others at one-half its value, then the few are required to contribute double their portion of the burden. This is manifestly a wrong and justice demands that it be redressed whenever it can be done conformably to the laws."

In *Illinois* the statute directed that each parcel of property should be valued at its true value in money. In a case where it appeared[3] that the valuation of the property of individuals ranged from one-fifth to one-third, while that of the railroad companies ranged from one-third to one-half, the court held that the assessment of the railroad property must be at the same percentage of the real value as that of individuals, and said: —

"The rule adopted by the assessors in this State has

[1] See also to the same effect Cocheco Co. *v.* Stratford, 51 N. H. 455.

[2] Ex parte Bridge Co., 62 Ark. 461.

[3] Board of Supervisors *v.* Railroad Co., 44 Ill. 229.

grown into a custom, and has been tacitly sanctioned by every department of the government for a long course of years, and it is now too late to challenge it. * * * Would not the sense of justice of every man in this community be outraged by allowing this or any other depreciation to one class of people, and demanding of another a higher tax on a similar article of the same actual value? The proposition cannot commend itself to the favor of any just man, and can receive no countenance in a court of justice."

In *Kansas* the constitution of the State required that the legislature should provide for a uniform and equal rate of assessment for taxation, while by the terms of the statute all property must be assessed at its true value. The court held[1] that the assessment of railroad property at its true value, while the property of individuals and other corporations was assessed at twenty-five per cent of its true value, was not uniform and equal taxation, and that plaintiff, having tendered its just share of taxes, was entitled to enjoin the collection of the illegal excess.

§ 471. **Equality of valuation enforced in Federal courts.**

These rulings of the State courts last cited, that effect must be given to the paramount purpose of equality in taxation, in disregard of the statutory directions that property must be assessed at its full value, have been followed in several notable cases in the Federal courts.

The United States Circuit Court of Appeals for the Eighth Circuit followed the decision of the Supreme Court of Kansas, and, reversing the United States Circuit Court, directed a decree of injunction against the enforcement of a tax on the full value of the plaintiff's property, assessed

[1] C. B. & Q. R. R. Co. *v.* Board of Commissioners, 54 Kansas 781.

by the State Board of Assessors of a county, pursuant to agreement among themselves, while other property in the county was assessed at only one-third of its value.[1]

Reference has already been made to the opinion of Mr. Justice Field in the California Railroad Case,[2] wherein was first announced the application of the Fourteenth Amendment to discriminating taxation. In holding that the deduction of a mortgage from the valuation of real estate in other cases and denying such deduction in the case of a railroad was necessarily a discrimination, the court said at page 394: "The basis of all *ad valorem* taxation is necessarily the assessment of the property; that is, the estimate of its value. Whatever affects the value necessarily increases or diminishes the tax proportionately. If, therefore, any element which is taken into consideration in the valuation of the property of one party be omitted in the valuation of the property of another, a discrimination is made against the one and in favor of the other, which destroys the uniformity so essential to all just and equal taxation."[3]

An opinion by Judge Taft in the United States Circuit Court of Appeals for the Seventh Circuit,[4] contains a thorough review of the authorities and is a valuable contribution on this question to our jurisprudence. It was established by the evidence that other property in the State of Tennessee than that of railroad companies was habitually and intentionally assessed at not exceeding seventy-five per cent of its real value. The actual value of the railroad and telegraph lines as compared with that

[1] C. B. & Q. R. R. Co. *v.* Commissioners of Republic County, 67 Fed. Rep. 411, 14 C. C. A. 456, and 32 U. S. App. 224.

[2] *Supra*, § 311.

[3] 18 Fed. Rep. 385.

[4] Taylor *v.* L. & N. R. R. Co., 31 C. C. A. 537, and 86 Fed. Rep. 350, affirming 85 Fed. Rep. 302, and 86 Fed. Rep. 168.

of other property would make the share of the former in the payment of taxes a little less than one-eighth of the whole. The actual assessment of railroad and telegraph property placed upon them an additional burden, so as to make their share of the total taxation one-sixth instead of one-eighth. The constitution of the State not only directed that taxes should be "equal and uniform" throughout its jurisdiction, but specifically required that "no one species of property from which a tax might be collected should be taxed higher than any other of the same value;" and the statute of the State required that all property should be assessed at its full value.[1]

§ 472. Judge Taft on dilemma of courts.

Upon the question presented whether the court should enforce equality in disregard of the statute or refuse to remedy inequality by following the statute, the court said that the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows in the same class was a flagrant violation of the constitution of the State forbidding discrimination in taxation between different species of property. In answer to the suggestion that the only remedy consistent with the constitution was by raising the assessments of other property, the court said that this was no remedy at all, as it would involve raising the total tax assessment of the State in each of the counties, and the absolute futility of such a course and the

[1] Judge Taft said in his opinion that Judge Lurton and he were inclined to think that any legislative system of tax assessment of property based on a uniform percentage of its value would be "according to its value" and would be a compliance with the constitutional mandate. The third judge, Severance, doubted on this subject, but it was said the difference was not material for they were of the unanimous opinion that the question was not controlling.

enormous expense and length of time necessary needed no comment. The court added, at page 552: "The question presented is, then, whether, when the sole object of an article of the constitution is being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the constitution and the law for attaining its sole object. We say 'apparent' departure from the constitutional method because that instrument contemplated a system in which all property should be assessed at its real value. It did not intend that a large part should be assessed at 75 per cent, and a smaller part at 100 per cent. The method of assessing one species of property cannot be truly said to be constitutional, without having regard to that pursued with other species; for the essence of the constitutional requirement is uniformity, and uniformity cannot be affirmed to exist without a due regard to the methods of assessing all species. Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the constitution. To hold otherwise is to make the restrictions of the constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident. The

same dilemma has been presented to other courts. They have not always taken the same horn."

§ 473. Judge Taft on distinction between sporadic and habitual discriminations.

Judge Taft commented on the decision of the Supreme Court in the Cummings case[1] and held that the principle there laid down in regard to discrimination in the valuation of national bank shares applies as well in the assessment of other classes of property. He said that there was nothing in the subsequent decisions of the Supreme Court,[2] distinguishing between habitual and sporadic discriminations, that changed the effect of the Cummings case, adding, page 560: —

"They merely emphasize the point that equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property; that such inequalities, due to mistake, to the fallibility of human judgment, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtained; that, in other words, what may be called 'sporadic cases of discrimination' cannot be remedied by the chancellor. He can only interfere when it is made clear that there is, with respect to certain species of property, systematic, intentional, and unlawful undervaluations for taxation by the taxing officers, which necessarily effect an unjust discrimination against the species of property of which the complainant is an owner. The reason for the distinction is obvious. The occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the result of an illegal purpose on the part of any one. If equitable interference in such cases

[1] *Supra*, § 293.

[2] Bank *v.* Kimball, *supra*, § 294; Stanley *v.* Supervisors, *supra*, § 294; Albuquerque Bank *v.* Perea, *supra*, § 469, note.

could be invoked, the obstruction to the collection of taxes would be so frequent as to be intolerable. More than this, an action to enjoin a tax, is a collateral attack upon the judgment of a *quasi* judicial tribunal; and it cannot be justified except on the ground of an obvious violation of law, or something equivalent to fraud. It does not lie where the injury complained of arises only from the erroneous, but honest, judgment of the lawfully constituted tax tribunal. The interference by the chancellor in the case at bar and in the Cummings case rests on something equivalent to fraud in the tribunal imposing the tax."

§ 474. Collection on excessive valuation enjoined.

The court further said in this case, as to the remedy to be applied, that the entire assessment on all classes of property was to be regarded as one judgment. The effect of an intentional and therefore fraudulent violation of the law by uniformly undervaluing certain classes of property, while assessing other classes at the full value, though a literal compliance with the law, made the whole assessment, considered as one judgment, a fraud upon the fully assessed property. This was true, although the particular board which assessed complainant's property might have been free from fraud or intentional discrimination. The court said therefore that an injunction could properly issue against the assessment upon the fully assessed property as void altogether, until a new and uniform assessment upon all property according to law could be made. In view however of the inconvenience to the public of the delay incident to a new assessment, the injunction would extend only to so much of the tax, as was based upon the excessive assessment, and the injunction therefore required that the complainant as a condition to the issue should pay to the proper officers a tax of seventy-five per cent of the assessment made by the defendants.

The opinion, in this case, while masterly in its reasoning and analysis of the law, does not discuss or invoke the guaranty of the equal protection of the laws under the Fourteenth Amendment, but is based upon general constitutional principles of taxation expounded by the State courts in the cases cited. Jurisdiction in the case was based upon adverse citizenship.[1]

§ 475. Formal resolution not necessary for intentional discrimination.

While the courts presume that assessors perform their duty, and habitual and intentional discrimination must not only be alleged but proved, it does not follow that this intention of assessors to discriminate should be proved by formal resolution to that effect. This was ruled in the case of discrimination against the shareholders in national banks.[2] Thus, in the United States Circuit Court of Oregon, where it was claimed that the lands in certain counties were assessed at one-third of their value, while the mortgages of plaintiff were assessed at the nominal value of the debts, that is, at the full value,[3] the court said that it was not necessary to make the assessment illegal that there should be an actual conspiracy or express design on the part of the assessors to disregard the law, adding: —

"Whenever the assessor of a district of a country as large as one of these counties uniformly estimates real property at only one-third of the value he places on

[1] The decision in the United States Circuit Court, by Judge Clark, is based directly upon the violation of the equal protection of the laws under the Fourteenth Amendment, 86 Fed. Rep. 168. See also Trustees of the Cincinnati Southern R. R. Co. *v.* Guenther, Trustee, 19 Fed. Rep. 395.

[2] See § 296.

[3] Dundee Mortgage & Inv. Co. *v.* Parrish, 24 Fed. Rep. 197; see also California & Oregon Land Co. *v.* Gowan, 48 Fed. Rep. 771.

mortgages, it is impossible to attribute the result to the infirmity of human judgment, and the only conclusion possible in the premises is that it was deliberately and wilfully done in pursuance of a settled purpose or rule on his part; and where the same thing occurs in a number of counties in various parts of the State it is manifest that the action of the assessors is not only wilful and deliberate, but that it is the result of general and well-understood custom to substitute this conventional value of real property for 'the true cash' one which the statute requires."[1]

§ 476. Chicago franchise tax cases.

A recent and interesting application of the Fourteenth Amendment against discriminating valuation was made by the United States Circuit Court in Illinois, as a sequence to the franchise tax litigation instituted by the Institute of Public School Teachers of Chicago against the public utility companies of that city.

The constitution of Illinois provided that the value of property should be ascertained as directed by the general assembly, and according to the statute the capital stock of corporations was to be valued by the State Board of Equalization so as to determine its "fair cash value." The Supreme Court of the State affirmed the judgment of the Circuit Court directing a *mandamus* against the State Board, requiring the board to determine the valuation

[1] The court said in its opinion that the practice was so universal and well known in Oregon that the court could take judicial notice of it and safely assume, that there was not an acre of land in Oregon valued for taxation at more than one-half of its true value. Generally it was not valued at more than one-third of its value. As personal property, especially money, is more liable to escape taxation than land, therefore, in a country governed largely by land owners, like Oregon, there was more or less undervaluation of land, upon the plea, more understood than expressed, that this was the only way to keep even with moneyed capital of the country and secure something like equality of burden.

of the stock and franchises of the defendant companies, by including in such valuation the indebtedness of the companies and not deducting therefrom the amounts paid to the municipality as compensation for the use of the franchises.[1] The court said that it was proper for the board, in ascertaining the fair cash value of the capital stock, to add the market or fair cash value of the shares to the market or fair cash value of the debt of the corporations, excluding the indebtedness for current expenses.

After the issue of this *mandamus*, suit was instituted in the United States Circuit Court by certain public utility companies of Chicago, street railway companies and others, claiming that the State Board of Equalization was about to proceed to assess their property in violation of the Fourteenth Amendment to the Constitution of the United States, by valuing their property at a higher rate, that is, at a higher proportion of its valuation, than other taxables in the State. Upon the first application for an injunction, the court held that there was nothing in the Illinois statute for the assessment and taxation of corporations which denied the equal protection of the laws, and that it could not assume that the Board of Equalization would so administer the law as to discriminate against plaintiff,[2] adding, at page 614: "If it transpires that the Board of Equalization, through pique, or under the lash and spur of some external power, or through personal fear, or moved by any other consideration than the impartial and independent discharge of its own duty, attempts to certify an assessed valuation that in its effect would be a fraud upon any taxpayer, the courts still remain open to the injured taxpayer." The court denied the motion for preliminary injunction, but retained the case.

[1] State Board of Equalization *v.* People, 191 Ill 528.

[2] Chicago Union Traction Co. *v.* State Bd. of Equalization, 112 Fed. Rep. 607.

Thereafter, on full hearing,[1] it appeared that the Board of Equalization, proceeding under the mandate of the Supreme Court, had reassessed the capital stock of certain corporations and their franchises for the year 1900, from thirty to forty-seven per cent higher than the assessment of such corporations in 1901, the assessment for the latter year having been made before the hearing. The court (Judges Grosscup and Humphrey) said that they were convinced from the record that the assessment of other property throughout the State for the year 1900, as finally equalized by the State Board of Equalization, did not exceed seventy per cent of the cash value, and that such standard was not adopted by the State Board unintentionally or inadvertently, but deliberately as a means of arriving at an equalization of taxable values throughout the State. Under the constitution of the State, uniformity was the dominating mandate. It is the prime maxim, said the court, in almost every system of taxation, where justice and fair play are sought. The reassessment of the complaining corporation for 1900 was a close approximation to the aggregate of its indebtedness and of its stock value as measured by the stock market quotations for April 1, 1900. The board appeared to have adopted these quotations as its own standard in making the reassessments, which accordingly did not indicate its really independent judgment. The stock exchange record for that one day out of the year was an arbitrary standard, to which the board was not restricted by the decision of the Supreme Court in the *mandamus* case. The court said further that when the cash value had been ascertained, there should have been such deduction as would have equalized the valuation with that placed upon other property in the State.

[1] Chicago Union Traction Co. *v.* State Board of Equalization, 114 Fed. Rep. 557.

§ 477. Valuation by capitalization of net earnings.

The court thereupon declared what it deemed the correct principle in ascertaining the fair cash value of public utility or *quasi* public corporations. This consisted in taking the net earnings for 1900, which did not appear to have been an exceptional year, as the basis of the valuation, and capitalizing them at the rate of six per cent. It was said that the data as to these net earnings was obtained from the books of the companies, kept for the information of stockholders, and not, apparently, with reference prospectively to tax valuation. An annual reduction equal to six per cent of the current value of cars, tracks and machinery was not excessive as the allowance for current depreciation. The net earnings should take into account also the increased rate of taxation for the year 1900 caused by the reassessments. As to the ratio of capitalization, the court fixed the rate of six per cent as the rate adopted in States where assessments were made upon the basis of net earnings, saying that this was less than the rate that some advanced advocates of municipal ownership were willing to guarantee to investors in securities of this character, but it was deemed justified by the considerations that attended the real investor's purchases of stock. The cash value having been thus ascertained, a deduction of thirty per cent was made therefrom to equalize the assessment with the assessment of other property in the State, according to the rate of assessment fixed as a standard by the board of equalization. The amount thus ascertained was divided by five, in accordance with the State law directing that all valuations should be thus divided, and, to the remaining fifth, the value of the tangible property was added. The sum was to be the assessed value for taxation.[1]

[1] In the case of one street railway company no net earnings were shown, that is the road seemed to have been operated at a loss. There-

The assessment thus having been reduced some eighteen million dollars, the court allowed an injunction on payment of the taxes on the reduced amount. It was held that there was no basis for the allowance of interest and penalties.

§ 478. Inequality of valuation as a Federal question.

In these Illinois cases there was no adverse citizenship, and jurisdiction was based solely on the Federal question involved. There was no evidence of fraud in the sense of corruption. The court was not concluded by the decision of the Supreme Court of the State in the *mandamus* case, as the companies assessed were not parties to that proceeding, and the question of discrimination was not involved therein. The court said with reference to this Federal question, that any substantial departure from the law in laying and distribution of taxes was a depriving of a citizen of his property without due process of law. In this sense the deprivation of property without due process of law is the denial of the equal protection of the laws.

It follows therefore that, where there is habitual and intentional discrimination in the valuation of property, resulting in substantial inequality of taxation, there is a denial of the equal protection of the laws. The discrimination must not be sporadic or occasional, but substantial; that is, the relative undervaluation must extend to a large class of individuals or corporations, and not solely to one individual or corporation. It is immaterial however that the discrimination is aimed only against one individual or class, as the equal protection of the laws requires that no person or class of persons shall be denied the same protection of the laws, which is enjoyed by other persons and

fore the court said that there was no basis upon which to assess the stock over and above the tangible property.

other classes in the same place and under like circumstances.

The State may classify and specialize in taxation (see Chapter XV) and thus, if the classification is natural and reasonable, subject different classes to different rates of taxation. It is true that the same result would be effected by a difference in the rate of valuation as by a difference in the rate of the tax. On account of the difficulty of reaching personal property, and particularly intangible personal property, for taxation, there is a very general disposition on the part of the assessors, frequently commented on by the courts, to value such property higher than real estate, which cannot be concealed. It is also true that some forms of personal property, such as money and securities and standard marketable articles, have a definite standard of value which real estate has not. In some States deductions for debts are allowed from assessments of personal property, and in some from credits only. These considerations may all influence assessors, and doubtless do so influence them, in discriminating valuations. But whether or not such considerations may afford a valid basis for classification, it is clear that such classification when authorized by the State constitution can only be made by the legislative power, and cannot be made by the arbitrary action of assessors. Such arbitrary discriminations by assessors between different classes of property in valuations for taxation are violative of due process of law as well as of the equal protection of the laws.[1]

[1] As to such discriminations see Dundee Mortgage and Investment Co. *v.* Parrish, *supra*, § 475; see also National Bank *v.* New York, 64 N. E. Rep. 756, where the N. Y. Court of Appeals held that the assessment of bank stock and other personal property at full value, while real estate was assessed at 60%, did not warrant injunctive relief. The case involved a question of procedure, and the decision also seems to have recognized the existence of legislative authority for the discriminating valuations.

CHAPTER XVII.

THE TAXING POWER OF CONGRESS.

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Art. I, Section 8 of the Constitution of the United States:—

"Section 8. The Congress shall have power: To lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts and excises, shall be uniform throughout the United States."

Art. I, Sec. 9, paragraph 4:—

"No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Art. I, Sec. 9, paragraph 5:—

"No tax or duty shall be laid on articles exported from any State."

§ 479. Taxing power of Congress granted by Constitution.

The Constitution of the United States, while restraining, expressly and by necessary implication, the taxing power of the States, grants certain taxing powers to Congress. As the Federal government under the Constitution is one of delegated powers, we must find the taxing power of Congress in the express or implied grants of the Constitution. Thus it is said by Justice Story:[1]—

"The government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

There is no power of taxation inherent in the United States, as there is in the States. The most serious vice of the Confederation was the absence of power in Congress to raise its own revenue for the execution of its powers. The

[1] Martin *v.* Hunter, 1 Wheaton 304, l. c. 326.

Constitution therefore granted to Congress specific powers of taxation dealing directly with the subject of taxation, exclusive as to duties on foreign imports, and concurrent with the States in internal taxation, subject to the qualifications of uniformity and apportionment in the exercise of these powers thus granted, as stated in the clauses quoted. In his opinion in Gibbons *v.* Ogden,[1] Chief Justice Marshall distinguished between this concurrent power of taxation and the power to regulate commerce, saying that the exercise of the taxing power by Congress does not interfere with the power of the State to tax for the support of its own government, and that, when each exercises the power of taxation, neither is exercising the power of the other.

§ 480. Purpose for which taxing power may be exercised.

It seems to be settled that the words in Article I, Section 8, above quoted, "To pay the debts and provide for the common defence and general welfare of the United States," do not grant a distinct power to Congress, but simply declare the object of the taxing power preceding, so that the clause is equivalent to the following: "Congress shall have power to lay and collect taxes, duties, imposts and excises, in order to pay the debts and provide for the common defence and general welfare of the United States." Congress therefore has not an unlimited power as to the purpose of taxation, and can levy taxes only for these specific objects.[2]

[1] See *supra*, § 101.

[2] Story's Commentaries on the Constitution, vol. 1, sec. 907. He says that the view that paying the debts and providing for the common defense and general welfare constitutes another substantial power, distinct from the power to tax, would make the government one of general and unlimited powers, and that, while this view has been main-

This limitation of the purposes for which taxes may be levied by Congress, while historically interesting, is really addressed to the legislative discretion rather than to the judicial power, for the reason that the specific purposes for which the proceeds of taxes are to be expended are not declared in the Acts of Congress levying them, and the courts cannot look beyond the acts themselves to discover those purposes. The same principle applies in the judicial review of the purposes for which State taxes are levied, and

tained by minds of great ingenuity and liberality, the contrary opinion has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable. He says also, sec. 926, that the argument in favor of the restricted construction has, perhaps, never been presented in a more precise and forcible shape than in the official opinion of Mr. Jefferson on the proposed Bank of the United States, February 16, 1791, as follows: "For the laying of taxes is the power, and the general welfare the purpose for which the power is to be exercised. Congress is not to lay taxes ad libitum for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner they are not to do anything they please, to provide for the general welfare, but only to lay taxes for that purpose." 7th Jefferson's Works 757.

In this construction Mr. Hamilton agreed, see Report on Manufactures, where he contends that, while the power to lay taxes is confined to purposes for the common defense and general welfare, the power of appropriation of public moneys is co-extensive, that is, that it may be applied to any purposes for the common defense and general welfare. The late Justice Miller in his Lectures on the Constitution, says, page 230: "At one time I did not concur in this peculiar manner of punctuating this instrument by commas and semicolons, without a period coming in between the opening words of this 8th section, 'Congress shall have power,' and the 18th clause with which it concludes. This clause, however, in regard to paying the debts and providing for the common defense and general welfare constitutes a proper qualification of the power to collect taxes, and in what may be called the same sentence is followed by the limitation requiring all duties, excises and imposts to be uniform, so that it seems probable that the meaning is that Congress shall have power to lay these taxes and collect them in order 'to pay the debts and provide for the common defence and general welfare.'"

See also John Randolph Tucker's Commentaries on the Constitution of the United States, sec. 222.

such questions in the courts have usually related to the validity of municipal bonds, for the payment of which taxation is required.[1]

Under the permanent revenue system of the government,[2] taxes are levied, not for specific purposes, but by continuing laws establishing the rate of customs duties and internal revenue taxes, and questions relating to the lawful purposes of taxation do not arise in the levying of taxes, but in the appropriation of public funds for public needs.

The power of taxation is sometimes invoked with no purpose of revenue in view, but solely to destroy the interest or business upon which the tax is levied, by taxing it out of existence. Thus the tax upon the State bank notes was imposed to destroy their use, so as to open the means for circulating the notes of the national banks.[3] While the only lawful purpose of taxation is revenue, the amount of the tax on any subject within the scope of the taxing power is for the legislative discretion to determine. "It is a perplexing inquiry unfit for the judicial department, what degree of taxation is the legitimate use and what degree may amount to an abuse of the power."[4] A legislator may therefore vote against an act, which he as a legislator deems unauthorized by the Constitution, and yet as a judge he might be compelled to sustain the same act as an exercise of legislative discretion not subject to judicial review.[5]

[1] See Chapter XII, on Public Purpose of Taxation.

[2] As to permanent tax laws, see Tucker on Constitutional Law, Secs. 239 and 240. He says that our system of permanent tax laws destroys the relation between taxation and representation. For difference between English and American practice as to revenue bills, see Miller's Lectures on the Constitution, pages 203 to 208.

[3] See *infra*, § 505.

[4] Chief Justice Marshall in McCulloch *v.* Maryland, 4 Wheaton, 438.

[5] In the 54th Congress the extent of the taxing power of Congress in suppressing industries was discussed in connection with the attempted passage of the so-called "anti-option" bill, proposing to tax out of existence the dealings in "options" and "futures." Some held that the taxing power was inadequate and relied on the commerce clause.

§ 481. **Appropriation of public money.**

The Constitution provides[1] that no money shall be drawn from the treasury but in consequence of appropriations made by law. In the exercise of this power of appropriation, or the expenditure of the proceeds of taxation, there could be no question as to two of the three authorized objects of expenditure, the payment of the debts, and the providing for the common defense. There was however a great difference in the opinions of the great master-minds in the formation and defense of the Constitution, Hamilton and Madison, as to the power of Congress to appropriate "for the general welfare of the United States." Thus Mr. Madison held that the words "general welfare," as a general description of the objects of the taxing power, were limited by and commensurate with the objects of the Constitution as defined in the enumerated powers specified, and that there can be no general welfare intended by the Constitution beyond what Congress has power to create, regulate and control by virtue of the enumerated powers. On the other hand, it was held by Mr. Hamilton that the words, "general welfare" include, not only the enumerated powers of the Constitution, but whatever Congress may deem to be for the general welfare.[2]

[1] Article I, Sec. 9, Par. 6.

[2] Justice Story said, 1 Story on Const., Sec. 958, of this and the other question arising out of this same grant to Congress of its taxing power, viz.: "Whether the government has a right to lay taxes for any other purpose than to raise revenue, however much that purpose may be for the common defense, or general welfare," that each of these questions had given rise to much animated controversy. The former involves the question whether Congress can lay taxes to protect and encourage domestic manufactures; the latter, whether Congress can appropriate money to internal improvements. "Each has been affirmed and denied, with great pertinacity, zeal and eloquent reasoning; each has become prominent in the struggles of party; and defeat in each has not hitherto silenced opposition, or given absolute security to victory. The contest is often renewed; and the attack and defense main-

But this question of the limitation of the legislative power in appropriation, for the reasons already stated, is political rather than judicial, and the subject has become, from a legal point of view, academic rather than practical since the decision of the Supreme Court in McCulloch *v.* Maryland, wherein the court held that Congress could establish a bank, although there was no authority given it in the enumerated powers of the Constitution to create a corporation of any kind. The court said that the great powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct war and support armies and navies carry with them the selection of the means for those great ends, saying at page 415: "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code."

The court called attention to the concluding clause of the eighth section of Article I, giving the power to make all laws necessary and proper for the carrying into execution the preceding powers, and said, at page 420: —

"The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no

tained with equal ardor. In discussing this subject, we are treading upon the ashes of yet unextinguished fires, *incedimus per ignes suppositos cineri doloso.*"

The question was practically determined by Congress in the matter of internal improvements, that while it could not constitutionally build canals and other works of internal improvement, it could appropriate money therefor. For the Hamiltonian view, see Report on Manufactures. For Mr. Madison's view, see veto message, March 3, 1817. For a thorough review of the subject from an anti-Hamiltonian view, see John Randolph Tucker's Commentaries on the Constitution, vol. 1, sec. 234, *et seq.*

other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

§ 482. Supreme Court on bounty legislation.

The practical difficulty in the review by the judiciary of the congressional discretion in the appropriation of public funds, is illustrated in the history of the bounty clause in the Tariff Act of 1890. This provided for payment from the treasury of the United States to the producers of beet sugar of a *bounty* of two cents or one and three-quarter cents per pound, according to the grade of the sugar. The constitutionality of this bounty was gravely doubted, and it was contended that the provision was void under the rule declared in Loan Association *v.* Topeka.[1] But the Supreme Court, in a case involving the validity of the Tariff Act of 1890,[2] declined to pass upon the constitutionality of this provision, though they conceded its grave importance, say-

[1] See *supra*, Chapter XII, The Public Purpose of Taxation.

[2] Field *v.* Clark, 143 U. S. 649.

ing, l. c. p. 695, "it would be difficult to suggest a question of larger importance or one the decision of which would be more far-reaching." The court said that even if it was unconstitutional, it would not invalidate the other sections of the tariff act, as the different objects had no legal connection with each other.

Subsequently, in the Tariff Act of 1894, Congress repealed this bounty provision, enacting that thereafter it should be unlawful to issue any licenses or pay any bounty for the production of sugar at any time. It seems however that when this repealing act was passed, certain manufacturers had taken out licenses under the act and had produced and manufactured the sugar on the faith thereof, but, by reason of the repeal of the act, were unable to obtain the money from the treasury on the warrants which had been issued to them. Congress therefore passed an act in 1895 appropriating money for the payment of those manufacturers and producers of sugar, who had complied with the act, but were debarred from payment by reason of its repeal in 1894. It seems that the parties who were entitled to payment under this act were few in number, and the appropriation called for about $250,000. The proper disbursing officer of the treasury refused to pay the warrants drawn pursuant to the act, upon the ground that the act was unconstitutional. A Louisiana corporation, entitled to payment under this act of 1895, applied to the Supreme Court of the District of Columbia for a *mandamus* against the Secretary of the Treasury and the Commissioner of Internal Revenue, to compel action on their part under the act. The act was declared unconstitutional by the Court of Appeals of the District of Columbia, on the ground that the bounty provision itself was unconstitutional and any appropriation on account of it invalid.[1] The Supreme

[1] United States ex rel. *v.* Carlisle, 5 D. C. App. 138.

Court [1] avoided any decision as to the validity of the bounty legislation in the act of 1890, but sustained the act of 1895, as within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honorable obligations and upon principles of right and justice. When it has decided such questions in the affirmative, and has appropriated public money for the payment of such claims, said the court, "its decision can rarely, if ever, be the subject of review by the judicial branch of the government."

§ 483. Moral and equitable claims as "debts."

It was argued in this case that there could be no valid claim growing out of an unconstitutional act. But the court said that the question involved was, not the validity of the claim under the unconstitutional act, but whether honorable considerations could arise warranting the appropriation. The parties whom Congress reimbursed could not be held to know, what no one else could know prior to the determination of that fact by some judicial tribunal, that the bounty law was unconstitutional. The power to raise money to pay the debts of the United States includes the power to appropriate the money when raised for that object, and the debts of the United States are not limited to those evidenced by some written obligation or otherwise of a strictly legal character. The court cited instances of appropriations of like character since the foundation of the government, and said, page 443: —

"Of course, the difference between the powers of the State legislatures and that of the Congress of the United States is not lost sight of, but it is believed that in relation to the power to recognize and to pay obligations resting only upon moral considerations or upon the general

[1] United States v. Realty Co., 163 U. S. 427.

principles of right and justice, the Federal Congress stands upon a level with the State legislature."

§ 484. Conclusiveness of legislative determination as to what are "debts."

The decision in the case cited establishes not only the principle that the term "debts" includes those debts or claims which arise upon a merely honorary obligation and would not be recoverable in a court of law if existing against an individual, but also that the determination of Congress in any given case that an appropriation is warranted upon such honorable and moral considerations cannot be reviewed by the courts. The opinion in this case is interesting and important, as it illustrates the practical difficulty of enforcing in any case the constitutional restrictions as to the purpose for which taxes can be levied. Thus the court said in this case at page 444: —

"In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government."

§ 485. Taxes, duties, imposts and excises.

The power to tax contained in Article I, section 8, of the Constitution is to lay and collect taxes, duties, imposts and excises. The terms "tax" and "duty" are used in paragraph one of section 9 and in paragraph 5, in respect to articles exported. The term "duty" in a narrower sense as used in the Constitution relates to custom duties, and

has been held equivalent to imposts. Thus, in section 10 of Article I of the Constitution, the States are prohibited from laying any imposts or duties on imports or exports; but "duties, imposts and excises" in section 8 are distinguished from other taxes which Congress has power to levy, in the requirement that they shall be uniform throughout the United States.[1]

An excise tax has been defined as one which is assessed upon some article of personal property, or money, or something which is exhausted in the use.[2] It is one which from its essence and nature must be paid in fact by the last man who buys and uses the property, because whoever has it, at the time when the tax is levied upon it, adds that amount to the selling price, when he comes to dispose of it or the property is consumed. From its derivation (*excidere* — to cut off) it means a tax upon specific commodities, paid at some time between the manufacture and the consumption. As used in the constitutional grant of the taxing power to Congress, the term has been given a broader meaning, so that it includes practically all taxes, other than customs

[1] See Story's Commentaries, Sec. 952; Knowlton *v.* Moore, 178 U. S. 41, 87. Mr Madison in his letter on the tariff of Semptember 18, 1828, 4 Elliot's Debates 600, says as to these different terms used in the grant of the taxing power: —

"Pleonasms, tautologies and the promiscuous use of terms and phrases differing in their shades of meaning (and always to be expounded with reference to the text and under the control of the general character and manifest scope of the instrument in which they are found) are to be ascribed sometimes to the purpose of general caution, sometimes to the imperfection of language, and sometimes to the imperfection of man himself. In this view of the subject it was quite natural, however certainly the general power to regulate trade might include a power to impose duties on it, not to omit it in a clause enumerating the several modes of revenue authorized by the Constitution. In few cases could the '*ex majori cautela*' occur with more claim to respect."

The term "duty" is used sometimes in the general sense of tax — as a "stamp duty."

[2] Miller's Lectures on the Constitution, p. 238.

duties, which are not direct taxes and which therefore do not require to be levied by the rule of apportionment.[1] Thus taxes on inheritances, on commercial exchange sales and stamp taxes of all kinds have been held to be excise taxes within the meaning of the Constitution.[2] In the Head Money Cases,[3] the tax levied by Congress on the business of bringing passengers from foreign countries was held to be an excise duty within the meaning of the Constitution.

The tax levied by Congress on manufactured tobacco is a tax on an article manufactured for consumption and imposed at a period intermediate the commencement of the manufacture and the final consumption, and is also an excise tax under the Constitution.[4] In the case last cited, the court reviewed the different definitions of the term excise, including that of Dr. Johnson: "A hateful tax levied upon commodities," an opinion which, the court says, was evidently shared by Blackstone, who said, after mentioning the number of articles that had been added to those excised, that it was "a list which no friend of his country would wish to see further increased." But the Supreme Court said that these are considerations of policy to be determined by the legislative branch, and not of power to be determined by the judiciary. All of the taxes enumerated in the various statutes for the collection of internal duties are not excises, but the great body of them, including the tax on tobacco, are plainly excises within the accepted definition of the term.

[1] In Maine *v.* Grand Trunk R. R. Co., *supra*, § 231, the term "excise" in a State statute was held properly applicable to the license for the exercise of corporate privileges in the State, based on the State's mileage proportion of the gross earnings. In State *v.* Hamlin, 86 Maine 495, an inheritance tax was classed as an excise tax.

[2] Pacific Ins. Co. *v.* Soule, 7 Wall. 433; Sholey *v.* Rew, 23 Wall. 331; Nicol *v.* Ames, 173 U. S. 509; Knowlton *v.* Moore, 178 U. S. 41.

[3] 112 U. S. 580.

[4] Patton *v.* Brady, 184 U. S. 608.

The taxing power therefore conferred by the Constitution upon Congress, it has been repeatedly held, includes all the subjects of taxation, under three express restrictions: First, direct taxes must be levied according to the rule of apportionment; second, all taxes must be uniform throughout the United States; and third, no tax can be levied upon exports. These are the express limitations upon the exercise of the general taxing power granted to Congress. There is also an implied limitation to this general grant, growing out of the relation of the Federal government to the States, and another, it has been claimed, growing out of the prohibition in the Constitution against the diminution of salaries during continuance in office.

§ 486. **What are direct taxes.**

The Constitution provides,[1] that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." Another clause[2] provides that "representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." The abolition of slavery made the "other persons" freemen, and it was provided by the second section of the Fourteenth Amendment that "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." No change was made by the Fourteenth Amendment in the provision for the apportionment of direct taxes.

[1] Article I, Section 9, Par. 4.
[2] Article I, Section 2, Par. 3.

Capitation or poll taxes and other direct taxes must therefore be apportioned among the States, each of which must pay according to its population and not according to its wealth.[1] The view was first entertained that the only other direct tax, besides the capitation or poll tax, was a tax upon land, and in Hylton *v.* United States,[2] which appears to have been the first decision of the Supreme Court as to the taxing power of Congress, a tax upon carriages kept for the party's own use was held not to be a direct tax, and therefore not required to be levied by the rule of apportionment. The same ruling was made with reference to the Income Tax of 1864, levied during the Civil War, which was declared to be, not a direct tax, but an excise tax, in a case involving a tax on income from professional earnings and from United States bonds.[3]

But the whole subject was re-examined in connection with the Income Tax of 1894, and the court there, upon full consideration, decided that the tax upon incomes from land is a direct tax, the same as if levied upon the land itself. The court however eight justices sitting, was equally divided on the questions of whether the same rule applied to incomes from personal property and whether

[1] A direct tax amounting to $20,000,000 was levied by Congress, August 5, 1861, and apportioned to the States in proportion to the population as shown by the census. The tax was levied upon lands and improvements, the public property of States and the United States excepted. It was held in United States *v.* Louisiana, 123 U. S. 32, that the act imposed no obligation upon the States as such, though the States could assume, and some did assume, the amounts apportioned. After the Civil War the collection of the tax was suspended by Congress, and the amounts collected were subsequently refunded to the States. For the enforcement of a direct tax by sales of delinquent lands, see Turner *v.* Smith, 14 Wallace, 553; Keely *v.* Sanders, 99 U. S. 441; Van Brocklin *v.* Tennessee, 117 U. S. 151.

[2] 3 Dallas 171, decided in 1796.

[3] Springer *v.* United States, 102 U. S. 586.

the invalidity of the provision as to the income from rentals would invalidate the act.[1]

Upon the rehearing, the tax on income, not only from real estate, but also from personal property, was adjudged a direct tax, and the whole act, since it was one entire scheme of taxation, was therefore declared void.[2]

§ 487. Inheritance tax not direct tax.

The meaning of the term direct taxes was again thoroughly argued and considered by the court in the case of the inheritance tax enacted in the Spanish War Revenue Act of 1898.[3] The inheritance or succession tax enacted during the Civil War had been held to be an excise tax[4] and therefore not a direct tax. But, as it had also been held under the same revenue act that an income tax was an excise tax and not a direct tax, it was argued that this decision had been overruled by the decision upon the Income Tax of 1894. The court held however that the case of Scholey *v.* Rew had not been overruled, but had been distinguished on the ground that the income tax was not involved in the case. "Undoubtedly," the court said, "in the course of the opinion in the Pollock case, it was said that, if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty

[1] Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, Justices White and Harlan dissenting and Justice Jackson absent. The justices all agreed in holding that the tax on income from bonds of municipal corporations was invalid as a tax upon the agencies of the State. The justices were also equally divided upon the question whether any part of the income tax, if not considered as a direct tax, was invalid for want of uniformity on either of the grounds suggested. Upon the rehearing however this question of uniformity was not decided or considered, the other questions decided being decisive of the case. As to uniformity in Federal taxation, see *infra*, § 491.

[2] 158 U. S. 601, Justices Harlan, Brown, Jackson and White dissenting.

[3] Knowlton *v.* Moore, 178 U. S. 41.

[4] Scholey *v.* Rew, 23 Wallace 331.

would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, because imposed upon property solely by reason of its ownership, could not be changed by affixing to it the qualification of excise or duty." The inheritance tax was therefore sustained as an excise tax and the decision in Scholey *v.* Rew was reaffirmed.

§ 488. Direct taxation in economic sense and constitutional sense distinguished.

It was strongly urged in Knowlton *v.* Moore that the ability to "shift the tax" was the basis of distinction adopted by the economists between an indirect and a direct tax; that is, if the party upon whom by law the burden of paying the tax was first cast could thereafter shift it to another person, the tax would be indirect, while if he could not shift it, the tax would be direct in the economic and in the constitutional sense. The court replied however that, although this theory of the economists had been referred to in the Income Tax Cases, it was not the basis of the conclusion of the court. The constitutional meaning of the word "direct" was the matter decided. As to this economic distinction, the court reiterated, page 83, what had been said in Nicol *v.* Ames:[1]—

"In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category, which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical

[1] 173 U. S. 509, 515.

matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

§ 489. Direct tax defined by Supreme Court in Knowlton v. Moore.

In the same case (Knowlton *v.* Moore) the effect of the decision in the Income Tax Cases was thus stated by the court, all of the judges concurring in this part of the opinion, page 82: —

"Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned."

It therefore follows that capitation or poll taxes, taxes upon real or personal property "solely because of the gen-

eral ownership of such property," whether owned by individuals or corporations, and taxes upon the income from such real or personal property, are direct taxes within the meaning of the Constitution and must be levied according to the rule of apportionment among the States according to population. Taxes upon all other subjects of taxation, including those upon incomes not from real or personal property, that is, incomes from services, professions, etc., taxes upon inheritances, license taxes upon occupations, and excise taxes upon commodities, are included in the words "duties, imposts and excises" and may be levied by Congress in its discretion without regard to the rule of apportionment.[1]

§ 490. Taxing power of Congress co-extensive with territory of United States.

The power of Congress in levying and collecting taxes, duties, imposts and excises, under section 8 of Article I of the Constitution, is co-extensive with the territory of the United States and includes the District of Columbia. This was adjudged in an early case,[2] wherein it was contended that Congress could not impose a direct tax on the District of Columbia by the rule of apportionment for national purposes. The court, in an opinion by Chief Justice Marshall, declared that the right of Congress to tax the

[1] The tax upon sugar refineries measured by gross receipts was held by the United States Circuit Court to be, not a direct tax, but an excise laid upon business. Spreckels Sugar Refining Co. *v.* McClain, 109 Fed. Rep. (Pa.) 76.

[2] Loughborough *v.* Blake, 5 Wheaton 317. Justice Brown in his opinion in Downes *v.* Bidwell, *infra*, § 495, says as to this quotation from the opinion, "so far as applicable to the District of Columbia, these observations are entirely sound. So far as they apply to the territories, they were not called for by the exigencies of the case." 182 U. S., p. 262. But *contra*, see the concurring opinion of Justice White in the same case, p. 292, and the dissenting opinion of Chief Justice Fuller, p. 352.

District did not depend solely upon the grant to Congress in the Constitution of exclusive legislative power over the District. The granting of the taxing power in the Constitution was generally without limitation as to place. It consequently extends to all places over which the government extends. If this could be doubted, the doubt would be removed by the subsequent words in the Constitution which modify the grant, that all duties, imposts and excises shall be uniform throughout the United States. The court continued, page 319: —

"Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit but one answer. It is the name given to our great republic, which is composed of States and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

The argument was presented that this would necessitate extending all direct taxes to the District and territories, which would be, not only inconvenient, but contrary to the understanding and practice of the government. The court replied that, while Congress clearly has no power to exempt any *State* from its due share of the burden, as the second section of the first article of the Constitution requires that direct taxation shall be extended to all the States upon the principle of apportionment, there is no necessity created for extending a direct tax to the District

or territories, because the ninth section of the same article does not require such extension. The general grant of power to lay and collect taxes, on the other hand, was made in terms which comprehended the District and territories as well as the States. The Constitution may therefore be understood to give a rule when the territories shall be taxed, without imposing the necessity of taxing them.

§ 491. Uniformity in Federal taxation.

The Constitution provides that all duties, imposts and excises shall be uniform throughout the United States. The uniformity thus required is geographical only, that is, the tax must operate equally throughout the United States. Intrinsic uniformity, equality of operation upon all persons similarly situated under the construction given to the requirement of equality and uniformity in State constitutions, is not required in this limitation upon Federal taxation.

Thus, in the Head Money Cases,[1] the Act of Congress regulating immigration and imposing a duty of fifty cents upon every passenger from foreign ports was held to be a uniform act, because it operated with the same force and effect in every place where the subject of it was found. It did not violate the requirement of uniformity, nor another provision of the Constitution directing that no preference should be given by the regulation of commerce to the ports of one State over those of another.[2]

This question of uniformity in taxation was thoroughly reviewed and definitely determined by the Supreme Court in the recent cases already referred to, involving the con-

[1] 112 U. S. 580. It was in this case and in this connection that Justice Miller, delivering the opinion of the court, stated the often quoted aphorism, "perfect uniformity and perfect equality in taxation, in all the aspects in which the human mind can view it, is a baseless dream."

[2] Article I, Sec. 9, Par. 6.

stitutionality of the War Revenue Act of 1898.[1] In the first of these cases, the court said that the tax upon sales made upon commercial exchanges answered the requirement of uniformity, whether that term was to be understood in its geographical sense or as meaning intrinsic uniformity, that is, uniformity as to all the taxpayers similarly situated with regard to the subject-matter of the tax. It was uniform in the former sense, because it operated wherever such sales were made, and in the latter or intrinsic sense, because the classification between the parties using such facilities in sales and those not using them was natural and therefore proper and legal.

But in the other case, Knowlton *v.* Moore, it was strongly argued that the inheritance taxation in question was lacking in intrinsic uniformity, because it exempted legacies and distributive shares in personal property below ten thousand dollars, classified the rate of tax according to the relationship or absence of relationship to the decedent of the legatee or distributee, and provided for a rate of tax graded according to the amount of the legacy or share. Under the decisions in some of the State courts such a tax would be invalid as wanting in intrinsic uniformity. But the court held in a learned and exhaustive opinion by Justice White, all the judges concurring, that the uniformity required by the Constitution in Federal taxation does not mean what the word "uniform" means, or the words "equal and uniform" mean, in the State constitutions. The former does not mean intrinsic, but only geographical, uniformity.

It was contended in this case that the act was lacking in geographical uniformity, as testamentary and intestate laws may vary in different States. The court replied that this was immaterial, as the same degree of relationship, or want

[1] Nicol *v.* Ames, *supra*, § 488, and Knowlton *v.* Moore, *supra*, § 487.

of relationship, to the deceased, wherever existing, was levied on at the same rate throughout the United States. Geographical uniformity does not require that the objects of the tax must exist with uniformity in the several States. Taxes are uniform in the constitutional sense, when they operate generally throughout the United States and uniformly wherever the subjects of the tax are found. Congress may select the subjects of taxation in its discretion, and it is immaterial whether the requirements of uniformity and equality, as understood in State taxation, are adhered to or not. The court called attention in its opinion to the fact that the requirement of uniformity in section eight only applies to duties, imposts and excises, and is not essential in the levy of all the taxes which the Constitution authorizes. Uniformity is not required in the levy of direct taxes, which are required to be apportioned. The effect of requiring inherent or intrinsic uniformity therefore would be that it would be applied only to those taxes to which in the nature of things the principle of such uniformity is least applicable and in which it is least susceptible of being enforced. Thus excise taxes and import duties, which are required to be uniform, look to particular subjects and take every conceivable form which may by the legislative authority be deemed best for the general welfare.

§ 492. Uniformity in levy of duties.

The requirement of geographical uniformity therefore extends to any form of taxation not included in the term direct taxes. Thus in the levy of duties upon importations, where specific and *ad valorem* duties are both employed, the same form of duty must be levied upon the same importation at whatever port it may be entered. Mr. Tucker, in his Constitutional Law, calls attention to an interesting illustration of this enforcement of uniformity

in the duty on sugar,[1] where the use of different tests in the different ports to measure the exact saccharine strength was held by the Secretary of the Treasury to produce a difference of duty in the ports, destroying the uniformity established by the Constitution.

§ 493. Levying duties under war power.

The uniformity clause of the Constitution received thorough and exhaustive discussion in the recent Insular Decisions of the Supreme Court, in cases involving the status of the territory acquired by the United States as the result of the Spanish war.

It was agreed by all of the judges that duties upon imports from the United States to Porto Rico collected by the military commander and by the President as commander in chief, from the time possession was taken of the island until the ratification of the treaty of peace, were legally exacted under the war power.[2]

The question of the collection of revenues during war had been considered in the cases growing out of the War of 1812, and also of the Mexican war. Thus a town captured by the enemy in the War of 1812 was deemed a foreign country as respected our revenue laws during the period of hostile occupation, and the goods imported into that town during such occupation did not become liable to pay duty to the United States by reason of the resumption by that nation of its sovereignty.[3] A Mexican port acquired by the United States in the Mexican War and held by its military authorities did not thereby become a port of the United States, but remained a foreign port, and duties were properly levied upon goods

[1] Tucker on Const., Sec. 218.

[2] Dooley *v.* United States, 182 U. S. 222.

[3] United States *v.* Rice, 4 Wheat. 246.

imported therefrom into the United States.[1] Duties were also properly levied in San Francisco, after it was taken by the United States during the Mexican War and prior to the treaty of peace, under the war tariff established by the government; and, thereafter, duties levied by order of the government in accordance with the Act of Congress were held properly levied, until the revenue laws of the United States were put into practical operation in California.[2]

§ 494. Uniformity clause as applied to territorial acquisitions.

The treaty of peace with Spain, whereunder Porto Rico and the Philippine Islands were ceded to the United States, was ratified on February 6, 1999, but the official proclamation of the President was not issued until April 11, 1899. On the following day, Congress enacted a law known as the Foraker Act,[3] declared in its title to be intended "temporarily to provide a revenue and civil government for Porto Rico," which established special tariff rates on merchandise going into Porto Rico from the United States or coming into the United States from Porto Rico, and provided further that these duties should be held as a separate fund for the benefit of the island and transferred to its local treasury.

Thus, before the treaty of peace, duties on goods from the United States into Porto Rico were collected by the military commander and by the President as commander in chief, and, as stated above, it was held that such duties were legally exacted under the war power. After the ratification of the treaty of peace and until the passage of the Foraker Act as above stated, the rates of duty established by the tariff laws of the United States were collected,

[1] Fleming *v.* Page, 9 Howard 603.

[2] Cross *v.* Harrison, 16 Howard 164.

[3] 31 Stat. 77, c. 191.

both in the ports of the United States and in Porto Rico. The court held,[1] that, with the ratification of peace between the United States and Spain, the island of Porto Rico ceased to be a foreign country, within the meaning of the tariff laws, and that the right to exact duties upon importations from Porto Rico to New York, and upon those from New York to Porto Rico ceased at the same time.[2]

But this decision only applied to the status prior to the enactment of the Foraker Act, and on the question of the validity of this act, presented in the case of Bidwell *v.* Downes,[3] five of the judges concurred in holding the act valid, but they did not concur in the grounds of their decision, so that there is no opinion of the court as such.[4]

§ 495. Insular Decisions.

Justice Brown, who announced the decision of the court, in Bidwell *v.* Downes, although none of the other justices concurred in the reasoning of his opinion, maintained that the island of Porto Rico is not a part of the United States within the meaning of the uniformity clause of the Constitution; that the revenue clause of the Constitution applies to the States of the Union and not to the Territories; and that the practical interpretation put by Congress upon the Constitution had been continuous and uniform to the effect that the Constitution is applicable to territories acquired

[1] De Lima *v.* Bidwell, 182 U. S. 1; Justices McKenna, Shiras, White and Gray dissenting.

[2] Dooley *v.* United States, 182 U. S. 222. Justices McKenna, Shiras, White and Gray dissented, holding that the duties collected both prior and subsequent to the treaty of peace were lawfully imposed.

[3] 182 U. S. 244.

[4] Hon. Charles E. Littlefield, in an interesting paper upon the Insular Cases, read before the American Bar Association of 1901, page 242, says: "The Insular Cases, and the manner in which the results were reached, the incongruity of the results and the variety of inconsistent views expressed by the different members of the court, are, I believe, without a parallel in our judicial history."

by conquest, only when and so far as Congress shall so direct. It followed therefore that the island of Porto Rico was a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clause of the Constitution. In the opinion however, he disclaimed any intention of holding that the inhabitants of the Territories are subject to the unrestrained power of Congress, and suggested that there is a clear distinction between such prohibitions of the Constitution as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only and throughout the United States and among the several States.

Justices White, McKenna and Shiras, concurring in the decision, maintained that Porto Rico occupied a position between that of a territory absolute and that of a domestic territory absolute; that Congress, in governing the Territories, is subject to the limitations of the Constitution, and that every provision of the Constitution which is applicable to the Territories is controlling therein. But territory acquired by the treaty-making power does not become "incorporated" in the United States without the concurring action of the legislative department of the government. Porto Rico therefore, in the international sense, was not a foreign country, since it was subject to the sovereignty of, and was owned by, the United States; but it was foreign to the United States in the domestic sense, because the island had not been incorporated into the United States, but was merely "appurtenant thereto" as a possession.

Justice Gray, in a separate concurring opinion, said that of necessity there is a "transition period" in the incorporation of acquired territory, and that a system of duties during that period may be established temporarily by Congress, within the scope of its authority under the Constitution of the United States.

On the other hand, four judges, Chief Justice Fuller,

and Justices Harlan, Brewer and Peckham, dissented *in toto*, holding that there is no constitutional basis for the theory of "incorporation," that all territory ceded to the United States becomes thereby an integral part of the Union and entitled to the protection of the Constitution, including the uniformity clause in regard to taxation.[1]

The same principle was applied in a case decided at the following term involving fourteen diamond rings brought to San Francisco by a soldier returning from the Philippines.[2] These goods were brought to the United States, subsequent to the ratification of the treaty of peace, and before the act establishing a rate of duty between the United States and the Philippines. The court followed its opinion in the case of DeLima *v.* Bidwell, *supra*, and held that the duties were illegally exacted, Justice Brown concurring in a separate opinion, and Justices Gray, Shiras, White and McKenna dissenting, so that the same division in the court continued.

§ 496. Tax upon exports.

The taxing power of Congress is expressly limited by the prohibition[3] that no tax or duty shall be laid on articles exported from any State. This is reinforced by the

[1] The Reporter appends a foot-note with the syllabi in this case, 182 U. S. 244, as follows: "In announcing the conclusion and judgment of the court in this case, Mr. Justice Brown delivered an opinion. Mr. Justice White delivered a concurring opinion which was also concurred in by Mr. Justice Shiras and Mr. Justice McKenna. Mr. Justice Gray also delivered a concurring opinion. The Chief Justice, Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham dissented. Thus it is seen that there is no opinion in which a majority of the court concurred. Under these circumstances I have, after consultation with Mr. Justice Brown, who announced the judgment, made head-notes of each of the sustaining opinions, and placed before each the names of the justices or justice who concurred in it."

[2] Fourteen Diamond Rings *v.* United States, 183 U. S. 177.

[3] Constitution, Art. I, Sec. 9, Par. 5.

following provision: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties, in another." The Constitution also prohibits[1] the States from levying any imposts or duties on imports or exports without the consent of Congress.[2] The term "imports and exports" in both of these clauses, limiting the taxing power of the States and national government, relates solely to foreign commerce.[3] It will be observed that the term "tax" in the first of these prohibitions appears as the alternative of "duty." It has been suggested that this language was probably intended to cover the case of a tax on an article which is *in transitu* to be exported, and the case of a duty upon the article when it becomes the subject of export.

The exemption only applies to property actually exported or *in transitu* to be exported, and the *intent* to export property is not sufficient. This question was raised in the Supreme Court in regard to the cotton tax levied during the Civil War. Its collection was resisted on the ground that it was necessarily a tax upon exports, as four-fifths of all the cotton raised in the country was in fact exported. Justice Miller in his lectures[4] says that the Supreme Court was equally divided upon this question, and it was not decided. It was subsequently held in other cases that the objection was not valid, and that the only property exempted from taxation under these provisions is that actually in process of exportation, which has begun its voyage or its preparation for the voyage.[5]

[1] Article I, Sec. 10, Par. 2.
[2] See *supra*, Chapter III.
[3] See *supra*, Chapter III.
[4] Miller's Lectures, pp. 252 and 592.
[5] Coe *v.* Errol, 116 U. S. 517; Turpin *v.* Burgess, 117 U. S. 504.

The exportation stamp required to be affixed to every package of tobacco intended for exportation before its removal from the factory was held constitutional,[1] the court saying that the stamp required was a means devised for the prevention of fraud by separating and identifying the tobacco intended for exportation. The excise tax laid on tobacco before its removal from the factory is not a duty on exports within the prohibition of the Constitution, even though the tobacco be intended for exportation.[2] In the case last cited the court cited the decision in Coe *v.* Errol, where property intended for removal to another State was held taxable, the court saying that the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State.

§ 497. **Tax on foreign bills of lading is tax on exports.**

The War Revenue Act of 1898, which has contributed so materially to the judicial discussion of the congressional taxing power, included a stamp tax on foreign bills of lading, and this was adjudged by the court, in an exhaustive opinion by Justice Brewer,[3] to be in substance and effect equivalent to a tax upon articles included in that bill of lading, and therefore a tax or duty upon exports, in conflict with the Constitution. It was strongly urged in this case that similar stamp duties had been enforced at different periods, since the foundation of the government, and never before been challenged. But the court replied that the practical construction of a statute, by those having actual charge of its execution, is to be relied upon only in cases of doubt; and that, when the meaning and scope of a constitutional provision are clear, it cannot be overthrown

[1] Pace *v.* Burgess, 92 U. S. 372.
[2] Turpin *v.* Burgess, 117 U. S. 504.
[3] Fairbank *v.* United States, 181 U. S. 283.

by legislative action, although several times repeated and never before challenged. The court added at page 311:—

"It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the recent statute of 1898. It must be borne in mind also in respect to this matter that during the first period exports were limited, and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution."

It was urged by counsel that the same reasoning would invalidate the tonnage tax and stamp duties on manifests. The court said that, without deciding the question as to those taxes, there might be a valid difference as indicated by the decisions of the court with respect to interstate commerce. Thus a State cannot by a license or otherwise impose a burden on the business of interstate commerce, but it can tax the vehicles and property employed in that business, so long and so far as they are property in the State. The court added: "This difference may have significance in respect to these other taxes. As heretofore said, we do not decide the question, but only make these suggestions to indicate that the matter has been considered."[1]

[1] Justices Harlan, Gray, White and McKenna dissented, saying that a stamp duty has had for centuries a well defined meaning, and that, in

§ 498. **Porto Rican Tariff of 1900 not tax on exports.**

An interesting case in the "Series of Insular Decisions" involved a consideration of the clause prohibiting a duty on exports, with reference to the duties levied under the Foraker Act of 1900 on goods shipped from New York to Porto Rico. It was strongly contended that, if Porto Rico is a "foreign country," these duties were clearly duties upon exports, and, on the other hand, if it is a domestic country and part of the United States, the duties were illegally exacted, because the act was an interference with the internal commerce of the country and a preference of one port thereof over another, in violation of the Constitution.[1] The court denied this contention by the same division as in the other Insular Cases.[2] Justice Brown, in his opinion, held that Porto Rico was not a foreign country within the meaning of the tariff act. The fact that the duties were not paid into the treasury of the United States, but held as a separate fund to be used for the purposes and benefit of Porto Rico, subject to repeal by the legislative assembly of that island, showed that the tax was not intended as a duty upon exports. But he added that he did not intend, by his opinion, to intimate that Congress could lay a tax upon the merchandise carried from one State into another.

Chief Justice Fuller, and Justices Harlan, Brewer and Peckham dissented, saying, page 175:—

view of the frequent legislation by Congress and its enforcement for nearly a century, the question must have arisen if it had been supposed by any one that such legislation infringes the constitutional rights of the citizen.

[1] Art. I, sec. 9, par. 5: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

[2] Dooley *v.* United States, 183 U. S. 151. There is an interesting critical review of the decisions in this case, and also of Woodruff *v.* Parham, *supra*, § 110, in a paper by Edward B. Whitney of New York, ex-Ass't Attorney-General of the United States, on the Insular Decisions in the *Columbia Law Review* of February, 1902.

"Congress may lay local taxes in the territories, affecting persons and property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one State to another, or from any State to the territories, or from any State to foreign countries, or grant a power in that regard which it does not possess. But the decision now made recognizes such powers in Congress as will enable it, under the guise of taxation, to exclude the products of Porto Rico from the States as well as the products of the States from Porto Rico; and this notwithstanding it was held in DeLima *v.* Bidwell, 182 U. S. 1, that Porto Rico after the ratification of the treaty with Spain ceased to be foreign and became domestic territory."

§ 499. Act conferring reciprocity powers on President sustained.

The Tariff Act of 1890 gave authority to the President to equalize duties on imports, by suspending the free introduction of certain commodities, when satisfied that any country producing such articles imposes duties or other exactions upon the agricultural or other products of the United States, which he may deem to be reciprocally unequal or unreasonable. All of the judges concurring held that, even if this reciprocal provision was invalid, it would not invalidate the other provisions of the act.[1] But it was held also, Chief Justice Fuller and Justice Lamar dissenting, that the provision was not open to the objection that it delegated legislative power to the President; that weight should be given to the fact that such powers had been given to the President with reference to trade and commerce since the foundation of the government; and that no discretion was allowed to the President, but it

[1] Field *v.* Clark, 143 U. S. 649.

was made his duty to act when he ascertained the facts. The court said, at page 693: —

"He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required, when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed."

§ 500. Taxing power of Congress with reference to treaty power.

It is no objection to the validity of any tax imposed by Act of Congress, that it violates provisions contained in the treaties of the government with other nations. This was determined by the court in the Head Money Cases,[1] and the same principle has been since declared. While a treaty is a law of the land, it has no superiority over an Act of Congress, and may therefore be repealed or modified

[1] 112 U. S. 580.

by an act of a later date. It was said by the court, in the case cited, that there is nothing in its essential character or in the branches of the government by which a treaty is made, to give it any superior sanctity. The general principle was laid down, that so far as a treaty made by the United States with a foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such enactments as Congress may pass for its enforcement, modification or repeal.[1] This principle is, of course, applicable in the case of customs duties. The validity of the duty, as enacted by Congress, cannot be affected by the provisions of any prior treaty, so far as the courts are concerned.

§ 501. State instrumentalities and agencies exempt from Federal taxation.

In the language of the Supreme Court in the Income Tax case:[2] "As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State." It was the unanimous opinion of the justices in this case, and this was the only point on which there was a unanimous concurrence, that so much of the income tax law of 1894 as imposed a tax upon the income derived from the interest of bonds issued by a municipal corporation was a tax upon the power of the State in its instrumentalities to borrow money, and was consequently repugnant to the Constitution of the United States. "The Constitution," the court said,

[1] As to the general principle involved, see Chinese Exclusion Case, 130 U. S. 581; Fong Yue Ting *v.* United States, 149 U. S. 721; Whitney *v.* Robinson, 124 U. S. 190.

[2] 157 U. S. 584.

"contemplates the independent exercise by the nation and the States severally of their constitutional powers."

It had been before decided[1] with reference to the Income Tax Law of 1864, that it was not competent for Congress to impose a tax upon the salary of a State judicial officer. The court ruled there that the case was controlled by the same principle as that of Dobbins *v.* Erie County,[2] deciding that a State cannot tax the salaries of officers of the United States; for, in respect to its reserved powers, the State is a sovereign as independent as the general government. It said, at page 127: —

"It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" [3]

The Internal Revenue Act of 1864 provided that railroads and certain other companies should pay a five per cent tax on the amount of all interest paid on their bonds. The city of Baltimore held five million dollars of the bonds of the Baltimore & Ohio Railroad issued for a loan by the city to the railroad of its own bonds to that amount. It

[1] Collector *v.* Day, 11 Wall. 113. See also United States *v.* Railroad Co., 17 Wall. 322, and Van Brocklin *v.* Tennessee, 117 U. S. 151, 178.

[2] *Supra*, § 14.

[3] Justice Bradley dissented in this case, saying that the decision established a limitation of the power of taxation which he thought would be found very difficult to control.

had already been decided by the Supreme Court that this was not a tax upon the corporations on their own account, but they were used as a convenient means of collecting the tax from the creditor or stockholder upon whom this tax was really laid,[1] and it was therefore held that this tax could not be collected from the revenue of the city, as it was not within the power of Congress to tax the municipal income or property. The court in this case made a distinction between municipal revenues proper and revenues from property, which was held in trust by the city for charitable or other purposes, and said it was quite possible that the latter would be subject to taxation, but that the railroad loan was a proper municipal purpose for the benefit of the city as well as the railroad company, and the city's interest therein was therefore beyond the taxing power of Congress.[2]

This principle was further applied by the United States Circuit Court of Appeals of the Sixth Circuit, in holding that a stamp, under the Act of 1898 could, not be required on the bond of a notary public, as such a requirement would be in effect a tax upon the exercise by the State of its governmental functions, and it was unimportant that the tax was required to be paid before the officer qualified.[3]

[1] Railroad Co. *v.* Jackson, 7 Wallace 262; Haight *v.* Railroad Co., 6 Wallace 17.

[2] United States *v.* Railroad Co., 17 Wallace 322. Justice Bradley concurred on the special ground that Congress did not intend by the internal revenue laws to tax property belonging to the States or municipal corporations; and Justices Clifford and Miller dissented, holding that private property owned by a municipal corporation merely in a proprietary right and not for governmental purposes is not entitled to exemption. It was held by the U. S. Circuit Court in Georgia, Georgia *v.* Atkins, 1 Abbott (U. S.), 22, that the word "corporation" in the Revenue Act of 1864, declaring that every person or corporation owning a railroad should pay a tax, did not include the Western & Atlantic Railroad owned by the State of Georgia, and managed by the State agents, and the profits from which were part of the revenue of the State.

[3] Betman *v.* Warwick, 47 C. C. A. 185, 108 Fed. Rep. 46. It was held in several State cases that the requirement that instruments should not

§ 502. State securities are not exempt from Federal inheritance taxes.

But this principle of the exemption of State agencies and instrumentalities from Federal taxation does not extend to the exemption of State and municipal securities from a Federal inheritance tax. These last are subject to taxation on the same principle that Federal securities are subject to a State inheritance tax. The tax is upon the right of inheritance, and not upon the property inherited.[1]

§ 503. Federal securities subject to Federal inheritance taxes.

It was also held, under the War Revenue Act of 1898,[2] that, as a State inheritance tax may lawfully be measured by the value or amount of the legacy, even if United States bonds are included in the legacy, the reasoning that justifies such a principle must, when applied to the case of a Federal inheritance tax upon the same legacy, lead to the same conclusion. The court declined to consider the question whether the United States, in the exercise of the power of taxation, can be estopped by a contract that such power should not be exercised, as in this case the tax was not levied upon the bonds which had been exempted from taxation, State and Federal, but upon the right of inheritance.[3]

be admissible in evidence unless stamped applied only to Federal courts, Congress having no power to control evidence in the State courts. Garland *v.* Gaines, 73 Conn. 662; Southern Ins. Co. *v.* Estes, 106 Tenn. 472, and 52 L. R. A. 915. In Minnesota it was held, Spoon *v.* Frambach, 83 Minn. 301, that the unstamped paper would be received in evidence, unless the omission of the stamp was shown to be fraudulent.

[1] Knowlton *v.* Moore, *supra.*

[2] Murdock *v.* Ward, 178 U. S. 139.

[3] The court said, by Justice Miller, in Mitchell *v.* Clark, 110 U. S. 643: "It is no answer to this to say that it interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this, as it does the States, and where the question of the *power* of

§ 504. Taxing power of Congress and State authority.

The relation to State authority of the taxing power of Congress was also considered in the cases involving the War Revenue Act of 1898, *supra*. It was claimed that the inheritance tax in that act was invalid,[1] since the transmission of property by death was exclusively subject to the legislative authority of the several States. But the court said that the tax was imposed upon the transmission or receipt of the inheritance or legacy, and not upon the right existing in the State to regulate that transmission or receipt. It was urged that the power to tax inheritances involves the power to destroy them. But that consideration, said the court, had no application to a lawful tax, because on that reasoning every such tax would become unlawful, and therefore none whatever could be levied. It added, page 60: "Under our constitutional system both the national and the State governments moving in their respective orbits have a common authority to tax many and diverse objects. But this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did, there would practically be an end of the dual system of government which the Constitution established."

§ 505. Taxing power of Congress and State franchises.

The lawful exercise of the taxing power by Congress may destroy a business or franchise exercised under State authority. This was illustrated by the Act of Congress imposing a tax of ten per cent upon the notes of State banks used for circulation after the first of August, 1866. The purpose, substantially admitted, was to drive the notes

Congress arises, as in the legal tender cases, and in bankruptcy cases, it does not depend upon the incidental effect of its exercise on contracts, but on the existence of the power itself."

[1] Knowlton *v.* Moore, *supra*.

from circulation, so as to open the means for circulating the notes of the national banks organized by Congress. This act was said by Justice Miller[1] to be a forcible illustration of the famous saying of Chief Justice Marshall: "The power to tax is the power to destroy." It was sustained by the Supreme Court.[2] The argument was advanced that the tax was direct and therefore should have been apportioned to the States, and that it impaired a franchise granted by them, but the court said, in an opinion by Chief Justice Chase, that these objections were untenable; that it was a duty or excise tax, and not direct; that franchises granted by the State are subject to taxation like other property, and even if the tax was excessive and indicative of a purpose to destroy the franchise, that was a question for Congress and not for the court. But apart from this, Congress having undertaken to provide a currency for the whole country, it could constitutionally secure the benefit of it to the people by appropriate legislation. It could therefore by suitable enactments restrain the circulation, as money, of any notes not issued under its own authority.

The act provided that this tax should be paid by any bank on the notes of any town, city or municipal corporation paid out by it, and the court enforced the collection of the tax against the National Bank of Little Rock on account of notes issued by the city of Little Rock and paid out by the bank. The court said[3] that the tax was not laid on the obligation, but on its use in a particular way; that a municipality could not, against the law of Congress, put its notes in circulation as money, and that the bank

[1] In Loan Assn. *v.* Topeka, 20 Wall. l. c. 663.

[2] Veazie Bank *v.* Fennell, 8 Wall. 533. Justices Nelson and Davis dissented, holding that, while Congress had power to tax the property of the banks, the tax in question was really one upon the powers and faculties of the State to create the banks, and the decision in fact struck at this latter, which was essential to the sovereignty of the States.

[3] National Bank *v.* United States, 101 U. S. 1.

which helped to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging its obligations, was taxed for what it did. "The taxation was no doubt intended to destroy the use. But that, as has just been seen, Congress had the power to do."

§ 506. Taxing power of Congress and police power of State.

While Congress may thus tax any property or franchise enjoyed under State authority, the exercise of its power of taxation can give no rights as against the lawful exercise of the police power of the State. In other words, Congress cannot authorize a trade or business within a State where it is prohibited in order to tax it. A license granted by Congress therefore may prohibit the carrying on of the business before payment of the tax, but this is only a mode of enforcing the payment. Such licenses, so far as they relate to trade within the State limits, give no authority to carry on the business, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade, if the taxes are paid. It follows therefore that a party failing to take out a license thus required may be indicted therefor. On the other hand, the possession of a license from the Federal government to sell liquors is no bar to an indictment under a State law prohibiting such sales.[1]

[1] McGuire *v.* Commonwealth, 3 Wallace 387, License Tax Cases, 5 Wall. 462; Pervear *v.* Commonwealth, 5 Wall. 475. It was held in Massachusetts, Commonwealth *v.* Crane, 158 Mass. 218, that a statute requiring everyone selling oleomargarine from a vehicle to put on both sides of the vehicle the sign "Licensed to sell oleomargarine," was not in conflict with the Act of Congress of August 2d, 1886, taxing and licensing the sale of oleomargarine. The court said that defendant's possession of a license under the Act of Congress afforded him no immunity from the police control of the State.

This subject was also considered by the Supreme Court in reference to the Act of Congress of August 2, 1886, imposing special taxes upon manufacturers of oleomargarine, as well as upon the wholesale and retail dealers in that compound. The State of Massachusetts enacted a law prohibiting the manufacture or sale of oleomargarine in imitation of butter. It was claimed that this latter act was an interference with interstate commerce, as Congress had legislated fully on the subject. But the Supreme Court said[1] that the Act of Congress was not intended as a regulation of commerce between the States, and that the taxes prescribed by that act were imposed for national purposes. Their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State whose law forbade such manufacture or sale, or to disregard any regulation, which the State might lawfully prescribe in reference to that act.

§ 507. Municipal corporations subject to internal revenue taxation.

A municipality which engages in the business of distilling spirits is not exempt from the tax levied upon that business by the United States, and it is immaterial, so far as the liability to the tax is concerned, that it had no lawful authority to engage therein. Salt Lake City, in what was then the Territory of Utah, set up this claim in a suit against the collector to recover the amount of

[1] Plumley *v.* Massachusetts, 155 U. S. 461. It was also held in this case that the doctrine of Leisy *v.* Hardin, 135 U. S. 100, did not justify the contention that the State was powerless to prevent the sale of deceitful imitations of articles of food in general use among the people. On this point Chief Justice Fuller and Justices Field and Brewer dissented, denying that a State can exclude from commerce legitimate objects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities.

taxes alleged to have been illegally exacted. But the court in an interesting opinion by Justice Miller, said:[1] —

"A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction by whomsoever conducted."

§ 508. Diminution of salaries by taxation.

The Constitution of the United States provides that the compensation of the judges both of the Supreme and inferior Federal courts shall not be diminished during their continuance in office,[2] and that the compensation of the President shall neither be increased nor diminished during the period for which he shall have been elected.[3] An income tax was imposed during the Civil War upon the salaries of both the judges and the President, on the ground that it did not diminish their salaries but only imposed a tax, and hence did not violate the constitutional provisions. But Chief Justice Taney, on February 16, 1863, in behalf of the court, in a letter to the Secretary of the Treasury, protested that such exaction, although called an income tax, was nevertheless a diminution of salaries, in violation of the Constitution. The matter was not acted on at the time, but subsequently, on October 23, 1869, the Attorney-General of the United States, Hon. E. R. Hoar, in a written opinion, advised the Secretary of the Treasury to the same effect.[4] The amounts collected

[1] Salt Lake City *v.* Hollister, 118 U. S. 256, l. c. p. 262.

[2] Article III, Sec. 1.

[3] Article II, Sec. 1, Par. 7.

[4] Opinions of Attorney-Generals, vol. 13, p. 161; see also Mis. Docs., No. 214, 53d Congress, 2d Session, containing a copy of the letter of Chief Justice Taney.

were afterwards returned. The opinion of the Attorney-General advised that, under the doctrine of Dobbins *v.* Erie County,[1] the compensation of an officer of the United States fixed by a law of Congress is not subject to taxation under State authority, because the effect of such a tax would be to diminish the compensation which the officer is by law entitled to receive, and that, as Congress is prohibited by the Constitution from diminishing the salaries paid the President and the judges during their respective terms of office, it can no more diminish such salaries by imposing excise taxes or duties thereon and deducting the amount from them, than can a State make such deductions from the salary of an officer of the United States. The tax operates as a direct diminution of the compensation of the officer in either case.[2]

§ 509. Progressive taxation.

It was strongly urged in Knowlton *v.* Moore, *supra*, that the *progressive* feature of the inheritance tax of 1898 was invalid, and so repugnant to fundamental principles of equality and justice, that the law should be held void, even though it transgressed no express limitation of the Constitution. The court had already held [3] that the progressive feature in the inheritance tax of Illinois was not violative of the Fourteenth Amendment. Such provisions however had been held invalid by some of the State courts,[4] as violating the uniformity required by their respective constitutions. The court declined to intimate in the opinion as to whether it had the right to exercise the power thus invoked, of declaring void a statute not in conflict with any

[1] *Supra*, § 14.

[2] See Miller's Lectures on Const., p. 247.

[3] Against the strong dissent of Mr. Justice Brewer, *supra*, p. 585, note.

[4] *Supra*, § 449.

express provision of the Constitution, and said that the facts in the case before them did not justify them in declaring the tax in question invalid. It said that some authoritative thinkers and a number of economic writers contend that a progressive tax is more just and equal than a proportionate one, and that, in the absence of constitutional provisions, the question whether it is or not is legislative and not judicial. In answer to a suggestion of the grave consequences of recognizing the right to levy progressive taxes, the court said at page 109: "If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory, is obvious." [1]

§ 510. Scope of Federal taxing power.

The great scope of the Federal taxing power is illustrated in the decision of the court sustaining the provision of the Spanish War Revenue Act of 1898, imposing a tax upon sales made upon boards of trade or exchanges.[2] This tax was upon any sales or agreements of sale at any exchange or board of trade, or other similar place, either for present or future delivery, and required a memorandum to be delivered by the seller to the buyer in every such case, to which should be affixed a stamp or stamps equal in value to the amount of the tax. It was claimed that this

[1] Justice Brewer dissented from so much of the opinion as held that a progressive rate of tax can be validly imposed, adhering to the views expressed by him in the Illinois case, *supra*, § 449.

[2] Nicol *v.* Ames, 173 U. S. 509.

tax was an illegal interference with the internal commerce of the States; that Congress had no power to require a written memorandum to be made of transactions within the State, so that a stamp might be placed thereon; that there was no proper basis for a privilege tax, and that it was in effect a direct tax. But the court held that none of these objections were well founded. It said that this was not a direct tax in the constitutional sense, using the language already quoted.[1] It was not a tax on the property, but on the privilege, or for the facilities afforded at exchanges or boards of trade for the transaction of business, and was therefore in the nature of a duty or excise. It was not lacking in uniformity either in the intrinsic or geographical sense, and there was no legal interference with commerce in the State.

And the court added, p. 516: —

"In searching for proper subjects of taxation to raise moneys for the support of the government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities, and one where such facilities are not availed of by the parties to the same kind of a transaction. Having the power to recognize these various facts, it must also follow that Congress is justified, if not compelled, in framing a statute relating to taxation, to legislate with direct reference to the existing conditions of trade and business throughout the whole country and to the manner in which they are carried on."

[1] *Supra*, § 488.

§ 511. Taxing power of Congress in relation to interstate commerce.

The power of Congress over interstate commerce is declared in the same clause of the Constitution with the power over foreign commerce. Congress is given power to regulate commerce with foreign nations and among the several States and with the Indian tribes; and this power, in the language of the Supreme Court, acknowledges no limitations other than those prescribed in the Constitution.[1] The Supreme Court in several cases has declared that Congress has the same power over interstate commerce as over foreign commerce.[2] This language however was used in cases which involved State interference with interstate commerce, and in connection with the assertion that the States can no more interfere with such commerce than with foreign commerce. On the other hand, it has been argued that the power over domestic commerce is not identical with the power over commerce with foreign nations and with the Indians, for the United States deals with a foreign nation as one sovereign with another; and that the right to interdict foreign commerce which may inhere in the power to regulate commerce with foreign or dependent nations, cannot be attributed by analogy to the power to regulate our own.[3]

Comprehensive as is the commerce power in the Constitution, the taxing power is clearly distinct and is expressly limited by the qualifications and exceptions stated. Thus the Constitution provides[4] that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

[1] Leisy *v.* Hardin, 135 U. S. 108.

[2] Crutcher *v.* Kentucky, 141 U. S. 47, 57; Pittsburgh Co. *v.* Bates, 156 U. S. 577, 587; Brown *v.* Houston, 114 U. S. 630.

[3] Randolph on Law and Policy of Annexation, pp. 94 to 98.

[4] Article I, Sec. 9, Par. 5.

Congress, in levying taxes under the constitutional grant, is not restrained, as are the States, from interfering with interstate commerce. Thus it may levy, subject to the requirement of geographical uniformity, indirect taxes or excises on the subjects or facilities of commerce, as in the stamp duties levied upon the bills of lading of public carriers and telegraph messages. This the States cannot do. Under the rule laid down however in the Income Tax Cases, *supra*, as reaffirmed in Knowlton *v.* Moore, *supra*, Congress cannot tax directly any property, whether of individuals or corporations, solely with reference to the general ownership of such property, except upon the rule of apportionment; and this requirement of apportionment would, under this rule, apply to the direct taxation of property employed in interstate commerce.

The question was discussed, though not decided, in Dooley *v.* United States,[1] whether Congress could lay an export tax upon the merchandise carried from one State to another. Justice Brown said that the question was not involved in the case, but intimated that, while such a tax is not forbidden by express words in the Constitution, it would be extremely difficult if not impossible to lay such a tax without violation of the requirement that all duties, imposts and excises shall be uniform throughout the United States. Justice White in his concurring opinion, page 165, said: —

"Certainly the argument cannot be that because a power has been conferred upon Congress by the Constitution to levy a tax on foreign commerce, therefore the Constitution has taken away from Congress power to tax even indirectly domestic commerce." He quoted the language of Chief Justice Chase in the License Tax Cases,[2] that the taxing power of Congress, as limited

[1] 183 U. S. 151.

[2] 5 Wallace 462, 471.

by the Constitution, and thus only, reaches every subject, and may be exercised at discretion, adding: "Of course, the Constitution contemplates freedom of commerce between the States, but it also confers upon Congress the powers of taxation to which I have referred."

The dissenting opinion, by Justices Fuller, Peckham, Brewer and Harlan, said that the power to regulate interstate commerce was granted in order that trade between the States might be left free from discriminating legislation, and not to impart the power to create antagonistic relations between them. If the power of regulation was absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure could be set at naught by a legislative body created by that instrument. It was also said that "Congress may lay local taxes on territories, affecting the persons or property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one State to another, or from any State to the territories, or from any State to foreign countries, or grant a power in that regard which it does not possess."[1]

§ 512. Congress may increase excise as well as property tax.

The power of taxation is not exhausted when once exercised. Taxes are not debts in the sense that having been once established and paid all further liability of the individual to the government ceases. Thus the Supreme Court said in a recent case:[2] "The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in

[1] See also remarks of Justice Brewer in Fairbank *v.* U. S., *supra*, § 497.

[2] Patton *v.* Brady, 184 U. S. 608, 619.

advance exactly what the government must have in order 'to provide for the common defense' and 'promote the general welfare.' * * * Taxation may run *pari passu* with expenditure. * * * Courts may not in this respect revise the action of Congress." If emergencies arise and Congress "determines in whole or in part on tax, that means an increase in the existing rate or perhaps in the subjects of taxation, and the judgment of Congress in respect thereto is not subject to judicial challenge."

This principle was applied by the court to the increased excise tax upon manufactured tobacco. The court said that not only may a general tax be imposed upon property, which has once paid an excise tax, but an excise tax may be increased, at least while the property is held for sale, and before it has passed into the hands of the consumer. The exercise of the power is limited solely by the rule of geographical uniformity.

§ 513. Taxation of property of non-resident aliens.

The taxing power of Congress extends to all the subjects of taxation within its jurisdiction, and therefore includes, if Congress deems proper, the property of alien non-residents, which is localized within the jurisdiction. Thus, under the Internal Revenue Act of 1866, a tax was imposed on alien non-resident holders of securities of domestic railroad companies. The court had expressed a doubt as to the validity of such a tax,[1] but it was held that the tax levied by the Act of 1866 was essentially an excise on the business of that class of corporations and properly collectible from the company. The tax was really levied on the corporation which paid the interest, not on the bondholders who received it, and it was therefore immaterial where the latter resided.[2]

[1] Railroad Co. *v.* Jackson, 7 Wall. 262.

[2] Railroad Co. *v.* Collector, 100 U. S. 595; and United States *v.* Erie Ry. Co., 106 U. S. 327, Justice Field dissenting.

As in the case of State taxation, it is a question of construction and not of power, whether such property of alien non-residents is subjected to taxation. Thus the inheritance tax law of 1898 was construed as not applying to the estates in this country of decedents domiciled abroad, although the Supreme Court held that it is within the power of Congress to impose an inheritance tax upon property in this country, no matter where it is owned or transmitted, provided the intention to tax is expressed in clear and unambiguous language.[1] The same ruling was made in a case where the will of the alien was actually executed in this country, the court holding that Congress had not expressed the intention to subject such estates to taxation.[2]

§ 514. Taxation of property of residents invested abroad.

The same principle, that the sovereign power of the taxing authority extends over all subjects of taxation within its jurisdiction, which was enforced in Kirtland *v.* Hotchkiss, an analogous case of State taxation, where the court held that a State can tax her resident citizens for debts held by them against non-residents and secured by a mortgage on property in another State,[3] was applied to a tax levied by Congress upon the property of residents located in another jurisdiction. Thus, in a suit[4] brought by a bank in California to recover taxes alleged to have been illegally levied and collected on its capital, because part of the capital was invested in foreign countries, the court said that the case was controlled by the principle announced in

[1] Eidman *v.* Martinez, 184 U. S. 578. The opinion in this case contains a careful review of the decisions in England and in the different States of this country, on the subject of the application of inheritance tax laws to property, within the jurisdiction, of decedents domiciled abroad. See also United States *v.* Hunnewell, 13 Fed. Rep. 617.

[2] Moore *v.* Ruckgaber, 184 U. S. 593.

[3] Kirtland *v.* Hotchkiss, 100 U. S. 491, *supra*, § 421.

[4] Sedgwick *v.* Bank, 104 U. S. 111.

Kirtland *v.* Hotchkiss. The bank was subject to the sovereign power of the United States and a proper object of taxation. "The investments abroad are still the property of the bank and part of its capital. In the absence of any averments to the contrary, we must presume they were such as banks usually make in doing a banking business, and that their legal *situs* was at the home office of the corporation. We need not consider, therefore, whether, if they had been made in fixed property subject exclusively to another jurisdiction, a different rule would apply."

§ 515. Taxing power of Congress over Territories.

The status of the territories with reference to the uniformity clause of the Constitution was discussed in the Insular Decisions, and the judges concurred in the opinion, though on different grounds, that "incorporated" territories of the Union are entitled to all the privileges of the Constitution, including the protection of the uniformity clause in Federal taxation.[1]

The power of Congress over the territories is general and plenary, arising from the right to acquire the territory itself, and the power given by the Constitution to make all needful rules and regulations restricting territory belonging to the United States.[2] Congress, in the exercise of its power to organize and govern the territories, combines Federal and State authority. It may not only abrogate laws of the Territorial legislature, but it may itself legislate directly for the local government. It may make a void act of the Territory valid and a valid act void. It was said by the Supreme Court through Justice Bradley in the

[1] § 495, *supra*. In the opinion of Mr. Justice Brown, this was based upon the action of Congress in extending the Constitution and laws of the United States over the territories.

[2] Mormon Church *v.* United States, 136 U. S. 1.

Mormon Church case, page 44: "Doubtless Congress, in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

In the organization of the incorporated Territories, Congress has conferred the power of local taxation. Under the general territorial system, as expressed in the various organic acts, the power of local taxation in the Territorial governments is absolute, save as restricted by the constitutional or congressional enactments. Thus it was held that the Territories of the United States have the power of taxing the national bank shares to the same extent as the States, that is, equally with other moneyed capital, although "Territories" are not mentioned in the National Banking Act. The court said that the word "State" in national legislation of the character of the National Banking Act should be construed as including Territories.[1] Congress therefore has plenary power to establish such system of local taxation in the Territories, directly or through the authority given to the Territorial legislature, as it deems proper; but duties imposts and excises, levied for national purposes by the United States, must be uniform over the organized and incorporated Territories as well as in the States.

§ 516. Taxation in District of Columbia.

The same general principle applies to congressional taxation in the District of Columbia. Congress is vested by the Constitution with exclusive legislative authority

[1] Talbott *v.* Silver Bow County, 139 U. S. 438.

over the District, but, irrespective of this grant of power, as was decided in Loughborough *v.* Blake,[1] the District as well as the Territories are included in the grant of the general taxing power. The sovereign power over the District therefore is lodged, not with the corporation created by Congress for its administration, but in the government of the United States. Its essential character as a municipal corporation has not been changed by the Act of Congress, abolishing the local legislature and providing for local administration through appointed officials.[2] The court said that it was not necessary to a municipal government or to municipal responsibility that the officers should be elected by the people. "All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them."

Congress however is the legal legislature over this municipality, exercises over it full and entire jurisdiction both of a political and municipal nature, and may legislate with reference to people and property therein, as may the legislature of a State over any of its subordinate municipalities. Thus it is within the constitutional power of Congress to tax different classes of property in the District at different rates. The Supreme Court held valid an act which taxed lands within the District outside of the cities of Washington and Georgetown, used solely for agricultural purposes, at $1.25 on the $100 and all other real and personal property in the District, not expressly exempted, at $1.50 on the $100, saying that, in the exercise of this power, Congress, like any State legislature unrestricted

[1] *Supra*, § 490.

[2] Metropolitan Railroad *v.* District of Columbia, 132 U. S. 1.

by constitutional provisions, may at its discretion wholly exempt certain classes of property for taxation, or may tax them at a lower rate than other property.[1]

Congress may also confer upon the city authority to assess adjacent proprietors with the expense of repairing streets,[2] and the tax need not be a general one over the city. In exercising this legislative power over persons and property within the District, Congress can also, provided no intervening rights are impaired, confirm the proceedings of an officer in the District, or of a subordinate municipality or other authority therein, which, without such confirmation, would be void,[3] and can also provide for the cost of a public improvement to the District by assessing a proportionate part on the property specially benefited.[4] It was held in this case that the United States possesses full and unlimited jurisdiction, both of a political and municipal nature, over the District, including the power of eminent domain, and this is not controlled by any provision in the act of cession by the State of Maryland.

While Congress can constitute the District a body corporate for municipal purposes, it can only authorize the municipality thus created to exercise municipal powers. It cannot therefore delegate legislative power to levy a tax interfering with interstate commerce. Thus an act of the legislative assembly of the District of Columbia established by Congress, requiring commercial agents offering mer-

[1] Gibbons *v.* District of Columbia, 116 U. S. 404.

[2] Willard *v.* Presbury, 14 Wall. 676.

[3] Mattingly *v.* District of Columbia, 97 U. S. 687.

[4] Shoemaker *v.* United States, 147 U. S. 282, § 374, *supra.* In this case it was claimed that the owner of the lands should be allowed in the assessment of damages for the value of prospective gold mines; but the Supreme Court sustained the court below in holding that, if there were any such mines, they were reserved to the Crown in the original grant by Charles I in the charter to Lord Baltimore, and therefore passed to the State and thence to the United States.

chandise for sale by sample to take out and pay for a license, was adjudged void [1] as being a regulation of interstate commerce, and not within the authority granted by Congress, nor within the authority which Congress was competent to grant. It was argued in this case that it is beyond the power of Congress to pass a law of this character solely for the District of Columbia, because whenever Congress acts upon the subject, the regulations it establishes must constitute a system applicable to the whole country. The court said that the disposition of the case called for no expression upon this point.

§ 517. Power of Congress in enforcing collection of taxes.

The power of Congress is both "to lay and collect taxes," and the grant of the taxing power is reinforced by what has been termed the "co-efficient power" contained in the last paragraph of the same section,[2] "the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

It was said by Mr. Madison in the *Federalist*: [3] "Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication. No axiom is more clearly established, in law, or in reason, than that wherever the end is required, the means are author-

[1] Stoutenburgh *v.* Hennick, 129 U. S. 141. Justice Miller dissented on the ground that this was not interstate commerce, as the District of Columbia was not a State.

[2] 2 Tucker on Const., p. 600; Federalist No. 33.

[3] Federalist, No. 44.

ized; wherever a general power to do a thing is given, every particular power for doing it is included." [1]

It follows therefore that Congress in levying taxes has the right to select the reasonable, appropriate and customary methods of collection. The due process of law in the Fifth Amendment, which restrains the powers of Congress as the Fourteenth Amendment restrains the powers of the States, is consistent with summary procedure in the collection of taxes.[2] The collection of the direct tax upon land levied by Congress during the Civil War was therefore enforced through the sale of delinquent lands, the collection of excises and duties upon commodities by summary seizure and forfeiture, and license taxes upon business through the requirement under penalties of a license as a condition precedent to the right of carrying on the business. In the recent Spanish War Revenue Act, the tax upon commercial exchange sales was collected through the requirement of a stamped memorandum required to be delivered by the seller to the buyer. In reply to the argument that this was an unreasonable requirement and an interference with strictly intra-state commerce, the court said[3] that Congress might have required a sworn report instead of a memorandum, but whether the means adopted was the best and most convenient was a question for the judgment of Congress, and its decision must be conclusive. "As Congress had the power to impose the tax, the means adopted for its collection within reasonable and rational limits must be a question for Congress alone."

[1] McCullough *v.* Maryland, *supra*, § 481.
[2] Murray *v.* Hoboken Land Co., *supra*, § 318.
[3] Nicol *v.* Ames, 173 U. S. 524.

CHAPTER XVIII.

THE ENFORCEMENT OF FEDERAL LIMITATIONS UPON THE TAXING POWER.

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§ 518. **Judicial remedies for illegal taxation.**

Where a tax is levied under the provisions of an unconstitutional act, the official enforcing such tax is no more justified in contemplation of law than if the act had not been passed. The official in such case has no legal sanction for his conduct, and is guilty of a personal violation of the taxpayer's rights. In the language of the Supreme Court, "an unconstitutional act is not a law; it binds no one and protects no one."[1]

It is a cherished maxim of the law that where there is a right there is a remedy. It is also a fundamental principle of our jurisprudence that the ordinary courts of justice are open for the protection of the citizen against those acting under governmental authority without due process of law. We have no official or administrative courts, such as those in the Continental States of Europe, where courts of law have not as a rule the power to decide upon the legality or illegality of the administrative acts of executive officials.[2] Such controversies in our jurisprudence are adjudged and determined by the due course of law, that is, by the law of the land, wherein the official stands as any other litigant, and must justify by due process of law.

"No man in this country," said Mr. Justice Miller,[3] "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the offi-

[1] Justice Field in Huntington *v.* Worthen, 120 U. S. 101.

[2] Brinton Coxe, "Judicial Power and Unconstitutional Legislation," chapter 102; Introduction to Thayer's "Cases on Constitutional Law," page 5.

[3] United States *v.* Lee, 106 U. S. 196, p. 220.

cers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."[1]

In the practical regulation of the remedial procedure of taxation, these fundamental principles must be reconciled with the public necessity, which requires that the collection of public revenues must be made at stated periods,[2] with the principle of public law, which prohibits a suit against a sovereign State except with its own consent and under conditions imposed by itself, and with the principles of public policy which protect administrative officers in the erroneous exercise of official discretion, and executive officers in the enforcement of process regularly issued and fair upon its face.

It is not within the scope of this work to discuss in detail the statutes and rules regulating the jurisdiction of the Federal courts, still less is it the purpose to consider the varying systems of procedure of the several States which may be followed in testing the validity of State taxation. Thus some States collect taxes through plenary actions at law, wherein the illegality of the tax may be pleaded and determined.[3] In other States, as in the United States, the payment of taxes under protest, with an action

[1] Judge Dillon, in his Laws and Jurisprudence of England and America, p. 225, says: "Arbitrary power and special administrative tribunals, such as we find in France and other countries, administering what the French call *droit administratif*, do not exist. In England the same law applies to all persons, and it is administered for and against all persons in the great law courts. The law of England knows nothing of exceptional offenses punished by extraordinary tribunals. So also direct personal responsibility for torts — for any invasion of the legal rights of another, exists without limit or exception. No command of an official, not even of the crown, can be pleaded in bar of any wrongful act."

[2] "If there existed in the courts, State or national, any general power of impeding or controlling the collection of taxes by relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary." Miller, J., in Cheatham *v.* United States, 92 U. S. 89.

[3] As in Missouri, see author's "Taxation in Missouri," Chapter XV.

to recover back the amount illegally paid, is authorized and regulated by statute.[1] In some States special statutory procedure for determining the validity of taxation and the equality of assessments is provided. The questions of procedure involving the construction of these widely varying statutes will be found in the local statutes and decisions. The subject of the procedure in the collection of taxes, required by due process of law, under the Federal and State constitutions, has been considered.[2] It is the purpose here to consider only those matters of procedure, which are involved in determining the lawfulness of the exercise of the taxing power, State and Federal, under the Constitution of the United States.

§ 519. Two forums for Federal question in taxation.

There are two distinct forums and modes of procedure for securing, on the Federal question in taxation, the judgment of the Supreme Court, that tribunal being the final arbiter in the construction and application of the Federal Constitution and laws.

One method of procedure is by raising the Federal question, that is, the claim of right or exemption under the Constitution and laws of the United States, in the State court, by way of defense in whatever proceeding is brought to enforce the tax, or by resisting the collection in whatever form of proceeding is authorized by the law of the State. It is not only essential that the claim of Federal right should be distinctly made upon the record, but also that the procedure adopted in resisting the tax should be appropriate under the State law, as the decision of the State court upon this latter question is conclusive. If the

[1] As in Tennessee, see Tennessee *v.* Sneed, 96 U. S. 69; also sections 3226, 3228, R. S. U. S.

[2] *Supra*, Chapter XI.

Federal claim is "specially set up" in the record, and decided adversely by the highest court of the State having jurisdiction, that decision may be reviewed upon writ of error by the Supreme Court.[1]

The other method of procedure, which may be employed in asserting a Federal right against taxation, is by invoking the Federal jurisdiction in the first instance by suit in the United States Circuit Court for the proper district, either on the ground of adverse citizenship if it exists in the case, or on the ground that the case arises under the Constitution and laws of the United States.[2] When suit is thus

[1] Sec. 709, R. S. U. S. "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. * * * The Supreme Court may reaffirm, reverse, modify or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

[2] It is provided by the Act of 1888, amending the Judiciary Act of 1875, Sec. 1: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.00, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." * * *

brought in the United States court, the unsuccessful litigant may go directly by appeal, if in equity, or by writ of error, if the action is at law, to the Supreme Court, the appellate jurisdiction depending only on the claim, in the case of a State tax, that the State law is repugnant to the Constitution of the United States. This right of appeal extends to both parties and the whole case is brought to the Supreme Court.[1] The construction or application of the Constitution involved in the case, in order to maintain such an appeal, must be controlling, although other questions may be open to determination and may be decided.[2]

§ 520. **Amount of tax as affecting procedure.**

Where the jurisdiction of the Supreme Court is invoked on writ of error to the highest court of the State having jurisdiction, the *amount* of the tax involved in controversy is immaterial; the only essential is the denial by the State court of a Federal right.[3] Neither is there any pecuniary limit in the appellate jurisdiction of the Supreme Court or of the Circuit Court of Appeals over the United States Circuit Court.[4]

On the other hand, the jurisdiction of the United States

[1] Loeb *v.* Columbia Township, 179 U. S. 472.

[2] Carey *v.* Houston & Texas Cen. Ry., 150 U. S. 171; Horner *v.* United States, 143 U. S. 570.

[3] In a recent case, Sentell *v.* Railroad Co., 166 U. S. 698, the Supreme Court determined on writ of error a claim for the value of a dog, and sustained, as valid under the Fourteenth Amendment, a statute of Louisiana, providing that no dog should be entitled to the protection of the law unless placed upon the assessment rolls. The court held also that, in a civil action for killing a dog, the owner cannot recover beyond the value fixed by himself in the last assessment.

[4] The Paquete Habana, 175 U. S. 677. The only pecuniary limit in appellate jurisdiction of the Supreme Court is the limit of $1,000 in cases decided on appeal in the Circuit Court of the United States, and on which the judgment of that court is not made final, as provided in section 6 of the Act of March 3, 1891.

Circuit Court, whether by original suit therein or by removal from the State court, only attaches where the amount in controversy "exceeds, exclusive of interest and costs, the sum or value of $2,000.00." In a suit involving the legality of a tax the "amount in controversy" is the amount of the tax, not the value of the land or the property upon which it is levied.[1] If the claim is only that the tax is *excessive* in amount, then the alleged excess is the amount in controversy, and, as will be seen, the payment of what is not claimed to be excessive is required as a condition of litigating the excess.

Separate and distinct assessments against different property owners, although made under the same law and in the same taxing district, cannot be "lumped" for the purpose of giving jurisdiction, but each of such cases involves a separate controversy, requiring the jurisdictional amount.[2]

It therefore follows that, where the amount of the tax claimed to be illegal or excessive does not exceed $2,000, the Federal claim must be asserted in the State court in such proceeding as may be authorized by the State, subject to the right of review in the Supreme Court on writ of error if the Federal claim is denied.

This however only applies where the validity of a State tax is involved. It is provided by the United States statutes[3] that the Circuit Courts are vested with jurisdiction of all suits at law or equity arising under any act providing for a revenue upon imports or tonnage, irrespective of the amount.[4]

It is sufficient to state, in this proceeding in the United

[1] Woodman *v.* Ely, 2 Fed. R. 839.

[2] Woodman *v.* Latimer, 2 Fed. R. 842; Linehan Ry. Trans. Co. *v.* Pendergrass, 16 C. C. A. 585; Ogden City *v.* Armstrong, 168 U. S. 224; Wheless *v.* St. Louis, 180 U. S. 379.

[3] Section 629.

[4] See Downes *v.* Bidwell, 182 U. S. 248, one of the Insular Cases.

States Circuit Court, that the taxes assessed and claimed to be illegal are a specified sum, larger than the jurisdictional limit, and it is not necessary to state how the taxes should be parcelled out by the State if collected.[1]

§ 521. Pleading Federal question in United States Circuit Courts.

When the original jurisdiction of the United States Circuit Court is invoked in a tax suit, on the sole ground that the controversy arises under the Constitution and laws of the United States, there being no adverse citizenship, the Federal question is clearly jurisdictional and must be distinctly pleaded in plaintiff's statement of his cause of action. In the language of the Supreme Court:[2] "It must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading, must dismiss the suit."[3]

It is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments must be positive.[4]

[1] Illinois Central R. R. Co. *v.* Adams, 180 U. S. 28.

[2] Colorado Central Mining Co. *v.* Turck, 150 U. S. 138, l. c. 143.

[3] See also Borgmeyer *v.* Idler, 159 U. S. 408.

[4] Hanford *v.* Davies, 163 U. S. 273, where the court said, l. c. 280: "We are not required to say that it is essential to the maintenance of the jurisdiction of the Circuit Court of such a suit that the pleading should refer, in words, to the particular clause of the Constitution relied on to sustain the claim of immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the Circuit Court is entitled to take cognizance."

Even if the jurisdictional adverse citizenship exists, the pleading of the Federal question as a distinct ground of jurisdiction is proper, as that issue will warrant an appeal to the Supreme Court instead of the Court of Appeals. It seems however that the Supreme Court, in determining whether the case is properly brought there as involving a Federal question, will look into the opinion of the Circuit Court, not for the purpose of ascertaining the evidence or the facts upon which the judgment is based, but for the purpose of ascertaining whether either party claimed in the proper form that the State law was in contravention of the Constitution.[1]

§ 522. **Federal question and right of removal.**

Under the removal statute, since its amendment in 1887, the defendant in a State court claiming a Federal right cannot remove the case to the United States court on that ground, irrespective of adverse citizenship in the cause, as the United States Circuit Court has no jurisdiction, either original or by removal, of a suit arising under the Constitution, treaties or laws of the United States, unless the Federal claim appears by plaintiff's statement of his cause of action.[2] The test of the right to remove is that it must be a case over which the Circuit Court might have exercised original jurisdiction under Section 1 of the act.[3] The Supreme Court has said that the change made from the former statute was in accordance with the general policy of the acts to contract the jurisdiction of the United States Circuit Courts.[4]

[1] Columbia Tp. *v.* Loeb, *supra*, § 519.

[2] Tennessee *v.* Union & Planters' Bank, 152 U. S. 454.

[3] See Section 2 of the Act of March 3, 1887, corrected by the Act of August 13, 1888; Arkansas *v.* Kansas & Texas Coal Co., 183 U. S. 185.

[4] The case of Southern Pac. Ry. Co. *v.* California, 118 U. S. 109, was decided under the former statute.

It is not sufficient for the plaintiff's appeal to contain a suggestion, that the defendants will contend that the law under which the plaintiff claims is void as violative of the Constitution of the United States. The suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under the Federal Constitution or laws. Neither can resort be had to judicial knowledge to raise controversies not presented in the pleadings.[1] But in such case the defendant, who has a Federal claim, is not without remedy, for, if he pleads and relies on such claim as a defense in the State court and that court decides against him, he can avail himself of the other method of procedure and carry the case by writ of error to the United States Supreme Court.[2]

§ 523. Federal question on writ of error to State court.

Whenever the Federal question is the basis of the jurisdiction, it should be distinctly pleaded, and, in a review of the decision of the State court by writ of error in the Supreme Court, it must appear from the record that the Federal question was raised and adversely decided by the State court. This adverse decision must be necessary to a complete adjudication of the controversy and decisive of the case. The statute requires that the Federal right must be distinctly "set up or claimed." The jurisdiction cannot be sustained by mere inference, but only by averment so distinct and positive as to place it beyond question that the party bringing the case from the State court intended there to assert the Federal right.[3]

[1] Mountain View Mining & Milling Co. *v.* McFadden, 180 U. S. 533.

[2] Railroad Co. *v.* Mississippi, 102 U. S. 135, 144.

[3] Oxley Stave Co. *v.* Butler County, 166 U. S. 649; Chicago & N. W. Ry. Co. *v.* Chicago, 164 U. S. 454; Michigan Sugar Co. *v.* Michigan, 185 U. S. 112.

The jurisdiction of the Supreme Court however depends, not so much upon the form of the statement of the claim in the State court, as upon the fact that the State court considered and decided a Federal question. Thus, in a case where the opinion of the State court did not consider Federal questions, but did construe and decide them in overruling a motion for rehearing, the Supreme Court held that there was sufficient to give jurisdiction on the writ of error, distinguishing this case from one where the court overruled the motion for rehearing, which set up for the first time the Federal question, without passing upon the Federal question.[1] It is also sufficient to sustain the jurisdiction of the Supreme Court, though the allegations asserting the Federal right are general and even ambiguous, provided they are treated as sufficient by the State court;[2] and, in condemnation cases where no formal answer is required, the Federal claim may be set up by written motion to set aside the verdict.[3] Thus, in a recent case, the Supreme Court said: "If the State court in deciding the case has actually considered and determined a Federal question, although arising on ambiguous averments, then a Federal controversy having been actually decided the right of this court to review obtains. All that is essential is that the Federal questions must be presented in the State court in such a manner as to bring them to the attention of that tribunal. And, of course, where it is shown by the record that the State court considered and decided the Federal question, the purpose of the statute is subserved."[4]

If the judgment of the State court can be affirmed on other grounds broad enough to sustain it, without deciding the Federal question, there is no basis for the jurisdiction

[1] Mallett *v.* North Carolina, 181 U. S. 589.
[2] M. K. & T. R. R. Co. Elliott, 184 U. S. 530, 532.
[3] C. B. & Q. R. Co. *v.* Chicago, 166 U. S. 222, 231.
[4] M. K. & T. R. R. Co. *v.* Elliott, 184 U. S. 530.

of the Federal court, which extends, not to the case, but to the Federal question controlling the case, and the writ of error will therefore be dismissed.[1] The Federal question is not sufficiently established, as having been set up or claimed in the State court, when the specific question does not appear in the record.[2] The court said in the case cited that it was not required to search the statutes of Mississippi to find one which could be construed as impairing the obligation of the contract.

The fact that the State court, while deciding the Federal question, erroneously holds that it is not a Federal question does not take the case out of the rule that, where a Federal question has been decided below, jurisdiction exists to review.[3] The court said that the result of the contrary doctrine would be that no case, where the question of a Federal right had been actually decided, could be reviewed in the Supreme Court, if the State court, in passing upon the question, had also decided that it was non-Federal in its character. But if the record shows that the State court did nothing more than decline to pass upon the Federal question, because, under the State practice, it was not properly brought to the attention of the trial court, there is no Federal question whereon to base the jurisdiction of the Supreme Court.[4]

§ 524. Questions of fact not considered on writ of error to State court.

On writ of error to the State court, it is immaterial whether the suit is an action at law or in chancery. In either case, when the facts are found by the State court,

[1] Rutland R. R. Co. *v.* Cen. Vt. R. Co., 159 U. S. 630 and cases cited.

[2] Yazoo & Miss. Valley R. Co. *v.* Adams, 180 U. S. 41.

[3] M. K. & T. R. R. Co. *v.* Elliott, *supra;* Carter *v.* Texas, 177 U. S. 442.

[4] Erie Railroad Co. *v.* Purdy, 185 U. S. 148.

the Supreme Court is controlled by such finding. If these questions of fact are adequate to determine the controversy and broad enough to maintain the judgment, independent of any Federal question, the Supreme Court is without jurisdiction, although the State court may also have determined the Federal question.[1] When the question decided by the State court is not merely of the weight or sufficiency of the evidence to prove a fact, but is of the competency and legal effect of the evidence as relating to a question of Federal law, the decision may be reviewed by the Supreme Court on writ of error.[2]

§ 525. Writ of error is to highest State court having jurisdiction.

The writ of error from the Supreme Court, under Sec. 709, R. S., U. S., is not necessarily to the highest court of the State, but to "the highest court of a State in which a decision of the suit can be had." It is therefore immaterial how the appellate jurisdiction under the State judicial system is distributed, the writ of error goes to whatever court of the State has the final jurisdiction in that case, and the decision of the State court as to what court has final jurisdiction is conclusive. If the case is not appealable, and the trial court is the court of final jurisdiction, then the writ goes to that court. The judgment however must be *final* and dispose of the case. A judgment reversing and remanding a cause for another trial is not a final judgment, though a decision of an appellate court of last resort, reversing and remanding a cause, and directing the specific judgment to be entered by the lower court, is a final judgment within the meaning of the Judiciary Act.

[1] Egan *v.* Clark, 165 U. S. 188.
[2] Dower *v.* Richards, 151 U. S. 658.

§ 526. Practical considerations in selection of procedure.

Assuming that the tax litigant has a choice of original forums, in that the tax in dispute is of the jurisdictional amount required for suit in the United States Circuit Court, there are eventualities, not to be overlooked, which grow out of the exercise of concurrent jurisdiction by the courts of distinct sovereignties, and the limited appellate jurisdiction of the Supreme Court over courts of the State. Thus, if the original concurrent jurisdiction of the United States Circuit Court is invoked, there being the necessary amount in controversy, whether the jurisdiction is based on adverse citizenship or on a cause arising under the Constitution, laws or treaties of the United States, the court has jurisdiction not merely of the Federal question involved, but of the entire cause concurrent with the State courts. In such a case the United States Circuit Court, and the Court of Appeals or Supreme Court, in the exercise of their appellate jurisdiction, will construe for themselves the State constitution and statutes, if there is any question in the case requiring such construction. It is true that as a rule the Federal courts follow the State courts in such construction; but it is not an infrequent occurrence that the Federal court is required to construe the State law without the assistance of a prior or authoritative construction by the State court, and in such case the court must exercise its own judgment upon general principles of constitutional law.[1] Thus it may well happen that a case may be decided one way by the United States Circuit Court, when the State court would have rendered a different decision, which, being the judgment of the State court on a question of State law, could not have been reversed by the Federal court.

On the other hand, there have been several cases where the claim of the invalidity of a State tax, as violative of

[1] See remarks of Miller, J., in Davidson *v.* New Orleans, 96 U. S. 97.

Federal law, has been sustained in the highest State court, and this judgment, being in favor of the Federal claim, is final, so that it cannot be reviewed by writ of error in the Supreme Court. In view of the indisposition of the latter court to overturn the tax systems of the States and its liberal construction of the State power of classification in taxation, a tax may be declared void by the State court as violative of Federal law, when it would have been held valid by the Federal court, had its jurisdiction been invoked.

This may be illustrated by the decisions of the Supreme Court and some of the State courts as to the power of the State to make progressive rates of inheritance taxation.[1] A still more notable illustration is the decision of the Supreme Court of Missouri holding invalid, as violative of the "equal protection of the laws" under the Fourteenth Amendment, the constitutional amendment taxing mortgages as interests in the property mortgaged and excepting railroad mortgages from its operation.[2] This decision by a State court construing and applying the Federal Constitution was final. While the result was doubtless fortunate for the State, it is by no means clear, in view of the liberal construction by the Supreme Court of the State power of classification in taxation, that the same result would have been reached, if the suit had been brought originally in the Federal court.

§ 527. Jurisdiction over case and over Federal question distinguished.

When the Supreme Court takes jurisdiction on appeal from, or writ of error to, the United States Circuit Court, on the ground that a Federal question is involved in the case,

[1] See Chapter XV.

[2] Russell *v.* Croy, 164 Mo. 69.

it takes jurisdiction of and decides the whole case and all the questions involved therein, and not merely the Federal question to which its jurisdiction is limited under writs of error to the State courts. If the case involves therefore not merely a Federal question, but also questions of general law, whereon the Federal courts do not as of course follow the decisions of the State courts, the judgment of the Supreme Court through this procedure may be secured upon the whole case and not merely upon the Federal question. On the other hand, in the review of the decisions of the State courts, the jurisdiction of the Supreme Court is based upon and limited to the Federal question, which is involved in and decisive of the case.[1]

§ 528. What is Federal question in taxation.

A Federal question in taxation is clearly raised, when it is claimed that the tax law as construed and enforced by the State impairs a right, privilege or exemption enjoyed under or protected by the Constitution, laws or treaties of the United States.[2] There is no Federal question involved in the claim that a State statute is not sufficiently definite and certain in its character, so that the amount of tax to be paid can be ascertained. The decision of the State court as to the proper construction and sufficiency of the statute is conclusive.

Neither is there any Federal question involved in a decision of a State court that assessors, in the absence of fraud or intentional wrong, are not personally liable for

[1] See remarks of Justice Miller in Davidson *v.* New Orleans, 96 U. S. 97; also Central Land Co. *v.* Laidley, 159 U. S. 103. For illustrations of both forms of procedure, see Huntington *v.* Worthen, 120 U. S. 97, *supra*, § 432; Little Rock & Ft. Smith Ry. Co. *v.* Same, 120 U. S. 97; Swofford *v.* Templeton, 185 U. S. 487.

[2] For cases involving alleged impairment of the obligation of contracts, where the Supreme Court construes the State law and determines for itself the existence of the contract, see *supra*, § 58.

error in the assessment.[1] The Supreme Court said that, whether the State court decided the question correctly or not, it is not a Federal question, but one of general municipal law to be governed either by the statute law or the common law of the State.

There is no Federal question involved in a suit between the lessor and lessee of a railroad, where the lessee has paid a tax and deducted it from the rent, and was sued by the lessor for the amount of deduction on the ground that the tax was illegal as an attempted regulation of commerce. The State court held that, independently of this question of constitutionality of the tax, it was the duty of the lessor to pay the tax, that, since the lessee had been compelled to pay it, the law implied a promise to repay the lessee, and that the latter was under no obligation to test the constitutionality of the tax. The Supreme court held that it had no jurisdiction to review the judgment.[2]

§ 529. Federal right must be set up in adversary proceeding.

To give the Supreme Court jurisdiction by writ of error to the State court, this claim of Federal right must be raised in an adversary proceeding where there are opposing parties, and wherein the court can render a binding adjudication. This was illustrated in a case from California,[3] where the statute authorized the board of directors of an irrigation district[4] to commence proceedings in a court of the State asking determination of the validity of the bonds it was about to issue. A resident of the district appeared

[1] Williams *v.* Weaver, 100 U. S. 547, see also Tyler *v.* Cass Co., 142 U. S. 288.

[2] Rutland R. R. Co. *v.* Central Vt. R. R., 159 U. S. 630.

[3] Tregea *v.* Modesto Irrigation District, 164 U. S. 179.

[4] Under the statute declared valid in Fallbrook Irrigation District *v.* Bradley, *supra*, § 362.

and claimed that the issue of the bonds would deprive him of his property "without due process of law." The Supreme Court held that the judgment of the State court holding the bonds valid was not subject to review on writ of error. The proceeding was one in effect to secure evidence, a mere *ex parte* case to obtain a judicial opinion, upon which the parties might base further action. It said, l. c. 189: "The State may determine for itself in what way it will secure evidence of the regularity of the proceedings of any of its municipal corporations, and unless in the course of such proceeding some constitutional right is denied to the individual, this court cannot interfere on the ground that the evidence may thereafter be used in some further action in which there are adversary claims. So on this ground, and not because no Federal question was insisted upon in the State court, the writ of error will be dismissed." [1]

§ 530. Injunction against taxation in Federal courts.

The remedy by injunction against illegal taxation is obviously the speediest, and frequently is the only, effective remedy. But the rule is well established in the Federal courts and generally in the State courts that a tax will not be enjoined solely on the ground of unconstitutionality. The general rule that relief in equity can only be sought in the absence of an adequate remedy at law is reinforced in the Federal courts by the provision of the United States statute.[2] Although this statute is only declaratory of what

[1] Justices Harlan, Gray and Brown dissented, holding that the payment would conclude all the taxpayers in the district, and that it was therefore the duty of the court to consider the case on the merits, but that the judgment should be affirmed under the principles announced in Fallbrook Irrigation Dist. *v.* Bradley, *supra*.

[2] Sec. 723 R. S. U. S.: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

was always the law, "it must, at least," said the Supreme Court, "have been intended to emphasize the rule, and to impress it upon the attention of the courts." [1]

It is also provided, by another section of the United States statutes,[2] that the writ of injunction shall not issue against any State court except in relation to bankruptcy proceedings.[3] The rule is also emphasized by still another provision of the statutes[4] that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This last statute however applies only to taxes levied by the United States, and is to be considered in connection with the provisions of the Internal Revenue Law,[5] providing for payment of taxes under protest, and regulating suits for recovery against collectors.

It was said however by Justice Miller with reference to this last provision: [6] "Though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared, if courts of justice could *in any case*, interfere with the process of collecting the taxes on which the government depends for its continual existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse

[1] New York Guaranty Co. *v.* Memphis Water Co., 107 U. S. 205, l. c. 214; Buzard *v.* Houston, 119 U. S. 347.

[2] Sec. 720. "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

[3] See Moore *v.* Halliday, 4 Dillon 52, where an injunction was allowed against county officers, but denied against the prosecution of pending suits for collection of taxes.

[4] Sec. 3224 R. S. U. S.

[5] Secs. 3226–8 R. S. U. S.

[6] In State Railroad Tax Cases, 92 U. S., p. 613.

sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice."

§ 531. **Want of adequate remedy at law must be shown.**

It is therefore required that a party asking an injunction in a Federal court against a State must show by proper averment that he has not "a plain, adequate and complete remedy at law." The mere assertion of unconstitutionality or illegality of a tax is not enough. "There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction." [1]

This principle has been applied by the Supreme Court in several tax cases.[2] Where the plaintiff alleges that he is threatened with irreparable injury, the facts constituting such injury must be stated. In Shelton *v.* Platt, the court said that, while an unconstitutional tax may confer no right and support no obligation, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction, where irreparable injury or other ground for equitable interposition is not shown to exist.

It is not necessary that the objection of "adequate remedy at law" should be raised by the pleadings or suggested by counsel; but the Supreme Court will, *sua sponte*, recognize the fact in examining the proofs and give it effect.[3]

[1] Hannewinkle *v.* Georgetown, 15 Wall. 548.

[2] Dows *v.* Chicago, 11 Wall. 108; Shelton *v.* Platt, 139 U. S. 591; Allen *v.* Pullman Car Co., 139 U. S. 658; Arkansas B. & L. Ass'n *v.* Madden, 175 U. S. 269; Pittsburgh, etc., Ry. Co. *v.* Board of Public Works, 172 U. S. 32.

[3] Allen *v.* P. Car Co., *supra*. It should be observed that in this and other Tennessee cases, the court commented on the fact that the State statute gave an adequate remedy by authorizing payment under protest and suit to recover, c. 44, p. 71, Laws of Tenn. 1873.

There is no right to enjoin the collection of a tax after it has been paid, though under protest. The Supreme Court said that the remedy in such case is by action at law, as the only equitable ground of relief ceases with the payment of the tax, whether voluntary or compulsory.[1]

§ 532. **Injunction often only proper remedy.**

But the preventive remedy to be obtained in a court of equity not only may be a proper remedy in cases of illegal taxation, but is often the only proper remedy. Thus, in the litigation involving the taxation of national bank stockholders, the remedy by injunction was held to be the proper remedy of shareholders, or of the bank suing in their behalf.[2] This was because the claim of deduction for debts must be made a reasonable length of time before the assessment roll is made up, and a party therefore should proceed promptly if his claim is denied, by resorting to a court of equity "to enjoin the collection of the illegal excess, upon the payment or tender of the amount due upon what was admitted as a just valuation."

The same consideration applies in cases of special taxation for street improvements, where a party, who waits until the improvement is completed before asserting his objection, may be held to be estopped from asserting such claim, when the rights of others would be prejudiced thereby.[3] This is under the equitable principle that "he who does not speak when he ought to speak, will not be allowed to speak when he would speak."

The threatened destruction or interruption of business,

[1] Singer Manufacturing Co. *v.* Wright, 141 U. S. 696, following Little *v.* Bowers, 134 U. S. 547.

[2] Hills *v.* Exchange Bank, 105 U. S. 319; Stanley *v.* Supervisors, 121 U. S. 535; Williams *v.* Supervisors, 122 U. S. 154; but see People's Nat. Bank *v.* Marye, 107 Fed. Rep. 571.

[3] Heman *v.* King, 85 Mo. App. 231.

through seizure of property for failure to pay a license claimed to be illegal, has been held "to constitute irreparable injury warranting an injunction,"[1] there being no adequate remedy at law.

The prevention of multiplicity of suits is a recognized ground of equitable interference, but the jurisdiction on this ground can only be invoked when the threatened suits are against the same person.[2]

It is obvious also that public policy often requires a speedy determination of the validity of a tax. If it is invalid, other provisions can be made for public needs, and uncertainty and delay avoided. In cases of alleged discrimination in valuation and consequent excessive taxation, it is to the interest of both the taxpayer and the public that the controversy should be promptly determined. It is for this reason that we frequently see cases made up and advanced by waiver of customary procedure, for the express purpose of avoiding the public and private embarrassments arising from delay and uncertainty.[3]

In a national bank case from Louisiana, where a money judgment was recovered by the bank against an assessor for alleged discrimination, the Supreme Court reversed the case[4] on the ground that the demurrer that relief should have been sought in equity, not in law, should have been sustained. The court said that the legal remedy in this case was inadequate and incongruous, and that it was immaterial that the laws of Louisiana secured to taxpayers the right of testing the justice of assessments before courts of justice in any procedure that the Constitution and laws permitted. The adoption by the Federal courts of the State

[1] Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. Rep. 258. See also Southern Ry. Co. *v.* Asheville, 69 Fed. Rep. 359.

[2] People's Nat. Bank *v.* Marye, 107 Fed. Rep. 571.

[3] See *infra*, Sec. 551.

[4] Lindsay *v.* Shreveport Bank, 156 U. S. 485.

practice must not be understood as authorizing legal and equitable claims to be blended in one suit.

§ 533. Procedure in Income Tax Cases.

This view of public policy, as demanding a prompt determination of the validity of a tax, was forcibly illustrated in the Income Tax Cases. The decision that the tax was invalid was rendered in a suit brought by a Massachusetts stockholder in a New York Trust Company to enjoin the corporation from paying a tax alleged to be illegal. The bill also contained allegations of threatened irreparable injury, and of ineffectual demand upon the corporation to refrain.[1] The objection of adequate remedy at law was not raised, nor was the statute prohibiting injunctions against the collection of taxes levied by Congress, *supra*, § 530, invoked.[2] The Chief Justice in his opinion[3] said on this point: —

"The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of voluntary action by the defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits."

§ 534. Habeas corpus as remedy for illegal taxation.

The collection of license, privilege and other occupation taxes is usually enforced by criminal prosecutions, with a

[1] See Hanes *v.* Oakland, 104 U. S. 450.

[2] See dissenting opinion of Justice White, 157 U. S. 608.

[3] 157 U. S. l. c. 554.

penalty of fine or imprisonment for prosecuting the business without a license. Where the latter penalty is imposed, the United States Circuit Courts have in a number of cases on writ of *habeas corpus* released the party from prison, on the ground that such imprisonment was in violation of the Constitution and laws of the United States, that being a ground for the issue of the writ by the Federal courts under the United States statutes.[1] But the rule is now established in the Federal courts that this writ cannot be used to perform the office of a writ of error or of an appeal. It is the settled and proper procedure, said the court in a recent case,[2] that this writ should not be issued, where the petitioner is imprisoned for violation of a State law, unless in cases of peculiar urgency; that instead of discharging they will leave the prisoner to be dealt with by the courts of the State, and that, after a final determination of the case by the State court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from the Supreme Court. The reason for this rule of procedure is that the jurisdiction given to the Federal courts to discharge, on writ of *habeas corpus*, the prisoner of the State is exceedingly delicate, and it therefore should not be exercised, unless the circumstances are of an exceptional nature. It was said however that a different question would be presented, if a party were compelled to submit to imprisonment notwithstanding an appeal or writ of error, before the final determination of the case upon the appeal.[3]

[1] Section 753, R. S. U. S. In Asher *v.* Texas, 128 U. S. 129, the plaintiff in a writ of *habeas corpus* was ordered discharged by the United States court on this ground, and the judgment of the State Supreme Court, denying the writ, was reversed.

[2] Baker *v.* Grice, 169 U. S. 284. See also In re Swan, 150 U. S. 637.

[3] See paper by Seymour D. Thompson, Am. Bar Assn., 1883, on, "Abuses of Habeas Corpus."

§ 535. Injunction only allowed on payment of taxes actually due.

In the State Railroad Tax Cases,[1] the rule was established in the practice of the Federal courts, that an injunction to stay the collection of taxes will not be granted, until the plaintiff has first paid the part of the tax conceded to be due, or which can be seen to be due on the face of the bill, or which can be shown by affidavits to be due, whether conceded to be due or not. The court said that the State is not to be tied up, as to that of which there is no contest, by lumping this uncontested amount with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered and tendered without the condition annexed of a receipt in full for all the taxes assessed. This was laid down as a rule to govern the courts of the United States in such cases, and in the subsequent cases cited this rule has been affirmed, and the failure to make such payment or tender treated as a fatal objection to the bill.[2] It was claimed by counsel, in the Illinois R. R. cases, that the violation of equality made the whole tax void, but the court held this to be untenable, saying: "Surely they should pay by some rule. Should they pay nothing and escape wholly because they have been assessed too high? These questions answer themselves."[3]

This rule rests on the cardinal principle of equity, that one who seeks equity must do equity, and it is now firmly established in the State as well as Federal courts in the law of injunctions. The plaintiff must show in his bill what portion of the tax is legal and what is illegal, in order that the court may be able to determine what portion of the tax

[1] 92 U. S. 575.

[2] National Bank *v.* Kimball, 103 U. S. 732; Northern Pacific R. R. *v.* Clark, 153 U. S. 252, 272; Albuquerque National Bank *v.* Perea, 147 U. S. 87.

[3] 92 U. S. 616.

should be paid, and what enjoined. Facts, not legal conclusions, should be stated in this regard, and an averment of "readiness to pay what is due" and even a tender in the bill is insufficient.[1] The payment or offer to pay must be actual and unconditional, and made in money to the tax collector.[2] The rule however obviously does not apply where plaintiff complains of the whole tax levied and all is to be paid or nothing.[3] Moreover should it appear that the tender was made in good faith, but the sum tendered was in fact less than is due, the bill is not dismissed absolutely, but an opportunity is given the plaintiff to pay the excess with the costs and penalties.[4]

§ 536. When application must first be made to State board.

When the question involved is not the validity of the tax *in toto*, but wholly the amount of the assessment, alleged to be excessive, either on account of overvaluation absolute or relative, or failure to make a required deduction, application must first be made to the revising or equalizing board appointed by the State to hear and act on complaints of excessive or erroneous assessments.[5] In the absence of statute, there is no jurisdiction in the courts to review the discretion of such tribunals, that is, a court of equity is not a court of errors to review their decisions. But the procedure established by the State for the correction of assessments, whatever it is, must be followed, if

[1] High on Injunctions (3d ed.), sec. 497, and cases cited; Huntington *v.* Palmer, 7 Sawyer 355.

[2] Huntington *v.* Palmer, 7 Sawyer 355.

[3] Norwood *v.* Baker, 172 U. S. l. c. p. 300; Lewiston Water & Power Co. *v.* Asotin Co., 24 Wash. 37.

[4] C. B. & Q. R. R. *v.* Norton Co., 14 C. C. A. 458.

[5] Dundee Co. *v.* Charlton, 32 Fed. Rep. 192. Beeson *v.* Johns, 124 U. S. 56; Hazzard *v.* O'Bannon, 36 Fed. Rep. 854; Hazzard *v.* O'Bannon, 38 Fed. Rep. 220. See also California & Oregon Land Co. *v.* Gowen, 48 Fed. Rep. 771.

open to the taxpayer, before he will be allowed to enjoin the alleged excessive assessment. If the State practice allows a judicial review of the findings of equalizing boards upon writ of *certiorari*, or other statutory procedure, resort must be had to the remedy thus provided.

It has been decided by the Supreme Court[1] that, if for any reason the statutory procedure was not open to a stockholder, as where his name was not placed on the assessment roll until the time for correction had passed, his remedy then is in a court of equity to enjoin the collection of the alleged illegal excess, upon payment or tender of the amount admitted to be due on a just valuation. A party failing to apply to the State board and not resorting to injunction cannot maintain an action at law to recover the excess of taxes alleged to have been paid upon the excessive valuation. The court said that the money collected on such an assessment could not be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction, before it is reversed.

§ 537. State statutory remedies do not oust equitable jurisdiction of Federal courts.

Whatever statutory remedies may be adopted by a State for testing the validity of tax assessments, they do not oust the jurisdiction in equity of the Federal courts, when the established principles and rules of equity permit a suitor to invoke that jurisdiction.[2] The Supreme Court, in this case, where it was claimed that the special jurisdiction

[1] Stanley *v.* Supervisors, 121 U. S. 535; Williams *v* Supervisors, 122 U. S. 154.

[2] Smyth *v.* Ames, 169 U. S. 466, 516. In Taylor *v.* L. & N. R. R., 31 C. C. A., p. 545, the court, in an opinion by Judge Taft, says that it is difficult to reconcile this opinion on its facts with Ewing *v.* St. Louis, 5 Wall. 418, which is not in terms overruled.

vested in the State court for determining the reasonableness of freight charges fixed by the State ousted the Circuit Court of its jurisdiction, held that a suitor entitled to sue in the Federal courts in equity cannot be deprived of that right by reason of being allowed to sue at law in the State court on the same cause of action, saying: "It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction."

The existence of a statutory procedure for determining the validity of taxation may be material in determining the adequacy of a remedy at law,[1] that is, whether the party is entitled to appeal to the equity jurisdiction of the Federal court. "The legislature of a State cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied to the courts of a State does not involve a question of power."[2]

Certiorari is not an adequate remedy in the Federal courts, as their power to issue the writ is limited to cases where it is necessary to the exercise of their jurisdiction. Nor is this remedy in the State court adequate in a case of alleged discrimination, when the facts relied upon to prove discrimination must be shown *de hors* the record.[3]

In the Sixth Circuit it was held by Judge Taft[4] that,

[1] See *supra*, § 531, note 3.

[2] Supreme Court in In re Tyler, 149 U. S. 164, 189.

[3] Taylor *v.* L. & N. R. R. Co., 31 C. C. A. 537. In New York the jurisdiction of *certiorari*, to correct inequalities in assessments, is enlarged by statute.

[4] Grether *v.* Wright, 23 C. C. A. 498.

where a State statute gives a remedy by injunction against the assessment and collection of taxes on the ground of illegality, this statute is a sufficient reason for exercising the equity jurisdiction of the Federal court. The court based this ruling upon the principle stated by Justice Miller in the case of Cummings *v.* Bank,[1] that Federal courts of equity will enforce new equitable rights conferred by State statutes. Judge Taft said, at page 504: "The main purpose of Section 723 of the Revised Statutes was to emphasize the necessity for preserving to litigants in courts of the United States the right to trial by jury secured by the Seventh Amendment in suits at common law, and that, where a State statute grants to litigants in its courts an equitable remedy which does not impinge on their right to a trial by jury at common law, courts of the United States, sitting in the State as courts of equity, may grant the same statutory relief as that afforded by the State tribunals."

§ 538. State can only be sued with its consent.

A sovereign State cannot be sued, except with its own consent. This immunity is secured to the States of the American Union by the Eleventh Amendment to the Constitution of the United States, and it is immaterial that the case arises under the Constitution, or laws, or treaties of the United States.[2]

When it appears that the State is an indispensable party to enable the Federal court, according to the rules which govern its procedure, to grant the relief sought, it will decline to take jurisdiction.[3] The court said however in this

[1] 101 U. S. 153.

[2] Hans *v.* Louisiana, 134 U. S. 1, holding that this immunity of the State from suits by citizens of other States, and citizens or subjects of foreign States extends to suits by its own citizens. The court in its opinion questions the decision in Chisholm *v.* Georgia, 2 Dallas 419, which occasioned the adoption of the Eleventh Amendment.

[3] Cunningham *v.* Macon & Brunswick R. Co., 109 U. S. 446.

case, page 451, that "in the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though some interest of hers may be more or less affected by the decision."

The failure of several States of the Union to pay debts which they contracted to pay, in connection with their immunity from suit, has led to numerous efforts to compel the performance of these obligations through judicial proceedings. Thus an effort was made to invoke the original jurisdiction of the Supreme Court, which extends to controversies between two or more States.[1] This was sought to be effected by citizens of New York and New Hampshire, who transferred certain State bonds of Louisiana to their respective States, so that suit was brought in the name of those States against the State of Louisiana in the Supreme Court. That tribunal however declined to take jurisdiction,[2] saying that one State cannot create a controversy with another State, within the meaning of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens.

When the State gives its consent to be sued by providing, as is sometimes done, that claims for illegal assessments can be made through suit against certain officials in certain of its own courts, this suit cannot be brought in the Federal court. Such a suit, brought in the United States Circuit Court, was held properly dismissed, as it was in effect one against the State itself, and the State had not consented to be sued except in one of its own courts.[3]

§ 539. Suit against State and against State officials distinguished.

A suit is in effect one against a State, within the prohibi-

[1] Constitution, Art. III, Sec. 2.

[2] New Hampshire *v.* Louisiana, New York *v.* Louisiana, 108 U. S. 76.

[3] Smith *v.* Reeves, 178 U. S. 436.

tion of the Eleventh Amendment, when the only remedy sought is the performance of a contract by the State, and the nominal defendants have no personal interest in the subject-matter of the suit, but only as representing the State. A distinction is made between cases, where affirmative official action is sought from State officials performing an obligation, which the State owes in its political capacity, and actions at law[1] or suits in equity maintained against those who, while claiming to act as officers of the State, violate and invade personal or property rights. In the latter class of cases the officer is sued, not as or because he is the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as a State official. To make out his defense he must show that his authority was sufficient in law to protect him.[2]

Thus suits against State officials to compel the performance by the State of its contracts, by seeking to enjoin them from bringing suits against taxpayers reported to be delinquent but who had tendered tax receivable coupons in payment of taxes,[3] to compel the levy of taxes authorized by a former law, but contrary to subsequent legislation,[4] and to compel the State to perform specifically a contract for the receipt of the State scrip for taxes,[5] were all held to be in effect suits against the State and within the inhibition of the Eleventh Amendment. A State therefore cannot be compelled by suit to perform its contracts, that is, its immunity from suit prevents the judicial power from being used to compel the performance of its

[1] See Cunningham *v.* Railroad, 109 U. S. 446; United States *v.* Lee, 106 U. S. 196.

[2] Hagood *v.* Southern, 117 U. S. 52.

[3] In re Ayers, 123 U. S. 443.

[4] Louisiana ex rel. N. Y. Guaranty Co. *v.* Steele, 134 U. S. 230. See also as to the same distinction, Pennoyer *v.* McConnaughy, 140 U. S. 1; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362.

[5] Hagood *v.* Southern, 117 U. S. 52.

contracts. In the language of the Supreme Court, "its contracts are substantially without sanction except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion."

The contract clause of the Constitution however[1] prohibits laws impairing the obligation of contracts. If such laws are passed, they are unconstitutional and void. The remedies available to parties who hold contracts of the State, as scrip or notes receivable for taxes, which are thus protected against impairment by subsequent legislation, were discussed in the Virginia Coupon Cases.[2]

Under the same principle, where the act to be done or omitted by the public official is purely ministerial, in the performance or omission of which the plaintiff has a legal interest, that performance or omission may be enforced by the court.[3] In such cases, said the Supreme Court, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer pleads the authority of an unconstitutional law for the non-performance of his duty, it will not prevent the issue of the writ. An unconstitutional law will be treated by the courts as null and void. This is the principle applied by the court in enforcing by writ of *mandamus* the levy of a tax for the payment of municipal bonds.[4]

The distinction was also made, in the Virginia Coupon Cases,[5] between the State itself and the government of the State, and a statute enacted by the State in violation of the Constitution of the United States was held in contemplation of law to be no law, and therefore a tax official assuming to act thereunder had no official sanction for his act.

[1] See Chapter II, *supra*.
[2] See Virginia Coupon Cases, *supra*, § 53.
[3] Board of Liquidation *v.* McComb, 92 U. S. 531.
[4] Seibert *v.* Lewis, 122 U. S. 284, and *infra*, § 545.
[5] *Supra*, § 55.

The immunity of a State from suit does not extend to the municipalities created by the State; nor does it prevent the recovery of money collected by tax officials for the State and paid under protest, when the money collected had not in effect passed into the State treasury, this of course being dependent upon the laws of the State.

§ 540. Where jurisdiction depends upon party, it is party named in record.

Under the distinctions stated in the cases cited, the legal immunity of a State from suit does not prevent the equitable resistance of the levy of an illegal tax. The assessment and collection of taxes must be made through officials, and they are subject to legal process like other individuals.[1] It was said in Osborn *v.* Bank of the United States,[2] by Chief Justice Marshall, in sustaining an injunction against the levying of a license tax upon the branch of the United States Bank in Ohio, that, in all cases where jurisdiction depends upon the party, it is the party named in the record, not the party interested in the cause. This broad statement has been modified to the extent of holding that, where the suit is in effect one against the State, as in the cases cited, and the State is the real defendant, and therefore an indispensable party, the jurisdiction must fail though the State is not a party to the record.[3] It was said by the Supreme Court[4] however that, while this ruling in Osborn *v.* Bank of the United States had been qualified to a certain degree by some of the subsequent decisions of the Supreme Court, yet the general doctrine there announced, that the Circuit Courts of the United States will restrain a State officer from executing the unconstitutional statute of a

[1] *Supra*, § 518.
[2] *Supra*, § 8.
[3] In re Ayers, 123 U. S. 443, 488.
[4] In re Tyler, 149 U. S. 164, 191.

State, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the Constitution and would do irreparable damage and injury to him, had never been departed from. If an individual, acting under the assumed authority of a State as one of its officers and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his authority and subjected to the consequences of his conduct. A State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.[1]

Although the tax law may not of itself be illegal, it may be wrongfully administered by officers of the State, so as to make the administration an illegal burden and exaction upon the individual and a violation of his constitutional rights. In such a case the fact that the officer assumes to act under a valid law will not oust the courts of their jurisdiction to restrain his excessive and illegal acts.[2]

§ 541. Collection of taxes on property in possession of receiver of Federal court.

When property is in the possession of a receiver appointed by a Circuit Court of the United States, it is not subject to seizure for State taxes. The exclusive remedy of the tax collector is to make application in the court which appointed the receiver, where the priority of payment granted by the laws of the State will be recognized and enforced.[3] The receiver of the court in charge of a railroad may obtain an injunction preventing the officer, *pendente lite*, from seizing property.[4]

[1] In re Ayers, 123 U. S., p. 507.

[2] Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 390.

[3] In re Tyler, 149 U. S. 164.

[4] Clark *v.* McGhee, 31 C. C. A. 321. Central Trust Co. *v.* Wabash Ry. Co., 26 Fed. Rep. 11, *contra*, was decided before the Tyler case.

The Act of Congress[1] permits a receiver to be sued without leave of court, but provides that such suit shall be subject to the general equity jurisdiction of the court in which the receiver was appointed, and that the receiver shall manage the property according to the valid laws of the State in which such property shall be situated. The Supreme Court said, in the case cited, that property in possession of the receiver is already in sequestration, already held in equitable execution, and that, while the lien of the taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. The receiver in that case had filed a bill in equity to restrain the collection of the taxes, on the ground that they were unconstitutional and illegal in part, tendering the amount alleged to be due. The court had thereupon granted an injunction in violation of which the sheriff levied on the railroad cars and was committed for contempt. He sued out a writ of *habeas corpus*, claiming that the suit was in effect one against the State, and that the statutes of North Carolina provided a statutory remedy for illegal assessment and taxation. But the Supreme Court said that the legislature of a State cannot determine the jurisdiction of the courts of the United States, and that, as the property was in the custody of the Circuit Court, under possession taken in a case confessedly within its jurisdiction, the petitioner was in contempt and the court was possessed of full power to vindicate its dignity and compel respect of its mandates.

§ 542. Objections to jurisdiction and defenses to merits.

The distinction between objections to the jurisdiction of the United States Circuit Court to try a suit seeking to enjoin a State tax and defenses which go to the merits and

[1] 24 Statutes 552, c. 373.

not to the jurisdiction was illustrated in a recent case from Mississippi.[1] The United States Circuit Court dismissed for want of jurisdiction a bill of a railroad company seeking an injunction against a tax collector on the ground of an alleged contract of exemption. Plaintiff appealed. In the Supreme Court, motion was made to dismiss the bill, because the assessment had been com pleted, suit brought for the taxes, and judgment recovered in the State court. The court however denied the motion, holding that this was a defense to the merits, not the jurisdiction, and that it did not follow that the judgment might not be reversed, as an appeal to the State Supreme Court was pending undetermined. Neither was a question of jurisdiction raised by the fact that the plaintiff did not show its right to proceed under the 94th equity rule, as this did not raise a question of jurisdiction, but of the authority of plaintiff to maintain the bill. The court said, page 34: "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of the cause upon the pleadings and the evidence." It was further said that motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law or to dispose of the merits of the case. The decrees of the circuit court were therefore reversed and remanded for hearing upon the merits.

§ 543. Judiciary concluded by decision of political department of government.

Our form of government, national and State, is based upon the distinction between the great departments of government, and the judiciary will follow the decision of the legislative or political department, on a subject law-

[1] Illinois Central R. R. *v.* Adams, 180 U. S. 28.

fully determined thereby, although such decision may incidentally affect property rights. Thus the Supreme Court held[1] that a taxpayer in Alexandria, Virginia, was estopped from resisting the collection of taxes on the ground that the annexation to Virginia was illegal, and that the county was in the jurisdiction of the District of Columbia. The court said that the judiciary would follow the action of the political department of the government, which had uniformly recognized the transfer as a settled fact, the State of Virginia having been in *de facto* possession of the County of Alexandria since 1847.

§ 544. No equity jurisdiction in Federal courts to enforce levy of tax.

The application of the contract clause in the Constitution of the United States to the right to a levy of taxes in enforcement of municipal obligations is established.[2] But this right cannot be enforced through a suit in chancery to compel the levy of the tax. The appropriate, though not always effective remedy, is an action at law, the establishment by judgment of the validity of the claim and of the amount due, and then a *mandamus*, on the return of the execution unsatisfied, requiring the proper municipal authority to raise by taxes the amount necessary to satisfy the debt. The right to this remedy is dependent upon the authority of the corporation to levy and collect taxes for their payment.[3]

The mere fact that the remedy by *mandamus* has proven ineffectual, and that no officer can be found to

[1] Phillips *v.* Payne, 92 U. S. 130, following Luther *v.* Borden, 7 How. 1.

[2] *Supra*, § 73.

[3] Heine *v.* Levee Commissioners, 19 Wall. 655, Justices Clifford and Swayne dissenting; Walkley *v.* Muscatine, 6 Wall. 481; Rees *v.* Watertown, 19 Wall. 107; Thompson *v.* Allen County, 115 U. S. 550, Justice Harlan dissenting.

perform the duty of levying and collecting the taxes constitutes no sufficient ground of equity jurisdiction. The principle is the same if no one can be found to act as tax collector of regular taxes, and yet this gives no jurisdiction to a court of equity to fill the office or appoint a receiver to perform its functions. Inadequacy of legal remedy does not consist merely in failure to produce the money sought to be collected, as that is a misfortune often attendant upon all remedies. The remedy must be, in its nature, not fitted or adapted to the end in view.[1]

§ 545. **Mandamus to issue tax.**

When a municipality is authorized to issue bonds, this authorization implies and carries with it, in the absence of specific provision, the power to adopt the ordinary means employed by such bodies to raise funds for the payment of bonds, and the ordinary means is taxation. The power to levy a tax is therefore carried, when authority to borrow money or incur an obligation is conferred upon a municipality, without any special mention that such power is granted. The fact that specific property is pledged for the payment of the bonds, *e. g.* the railroad stock for which the bonds were issued, does not make them any the less the general obligations of the municipality, nor deprive plaintiffs of the right to a *mandamus*, compelling the levy of a tax for their payment, since the pledge is only by way of collateral security.[2] It is otherwise however, when the power to tax is ex-

[1] Thompson *v.* Allen County, *supra.*

[2] United States ex rel. *v.* New Orleans, 98 U. S. 381; Ralls County *v.* United States, 105 U. S. 736; Quincy *v.* Jackson, 113 U. S. 337; Scotland County Court *v.* Hill, 140 U. S. 46. In Findlay *v.* McAllister, 113 U. S. 104, it was held that the confederating together of persons to prevent the levy of a county tax in obedience to a writ of *mandamus*, and the prevention of the sale of property seized under the levy by threats and by intimidating bidders, and the intimidation of taxpayers and influencing them not to pay the tax, whereby the judgment creditor was injured, constituted a good cause of action.

pressly limited by statute at the time of the issue of the bonds, so that the bondholder by the terms of his contract is only entitled to look to a specific tax for their payment.[1]

§ 546. Mandamus must be based upon statute authorizing tax.

This right to a *mandamus* must be based upon the statute making it obligatory upon the municipal authorities to levy a tax in payment of the judgment. Thus it was said by the Circuit Court of Appeals for the Eighth Circuit,[2] that, where no statute expressly made it obligatory upon the county to levy a tax to pay a judgment against it, and it did not appear that the judgment was on a security issued under a statute making it obligatory to levy a tax to pay it, the court had no authority to compel, by *mandamus*, the levy of a tax to pay such judgment. Under our system of government, said the court, the power to tax is a legislative function exclusively and cannot be exercised except in pursuance of legislative authority. A court has no taxing powers, and can impart none to the county authorities. It has therefore no jurisdiction to coerce the levy of a tax, except where the law has made it the clear and absolute duty of the county authorities to levy such tax. When the law has made it the duty of the levying court or board to levy a tax to pay a specified class of indebtedness, the Federal court in which a judgment has been rendered in that class of indebtedness may, by *mandamus*, compel the assessment, levy and collection of a tax to pay such judgment; but this is the limit of its power. As there was nothing shown as to the nature of the cause of action which affected the contract right to the levy of a tax, it was treated as an ordinary

[1] United States *v.* County of Macon, 99 U. S. 582; East St. Louis *v.* United States ex rel. Zebley, 110 U. S. 321.

[2] Board of Commissioners *v.* King, 14 C. C. A 421.

case of county indebtedness, and the discretion of the commissioners was held not subject to control by *mandamus*.

§ 547. Local tax laws administered in Federal courts.

The jurisdiction of the Federal court is frequently invoked on the ground of diverse citizenship in cases involving the construction and application of State tax laws, where there is no distinct Federal question involved. Thus tax deeds may be offered in evidence in the Federal courts in ejectment suits or other actions affecting titles to real estate. It is a general rule that the Federal courts in such cases, exercising a concurrent jurisdiction with the State courts, administer the State laws, as construed by the State courts. Thus the Supreme Court said in a case from Mississippi, involving the validity of a tax deed:[1] "No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the State for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the non-payment of taxes, and the form and efficacy of the tax deed, are all subjects which the State has power to prescribe, and peculiarly and vitally affecting its well-being. The determination of any questions affecting them is a matter primarily belonging to the courts of the State, and the national

[1] Lewis *v.* Monson, 151 U. S. 545. In Geekie *v.* Kirby Carpenter Co., 106 U. S. 379, the court, construing the tax law of Wisconsin, held that a tax deed was invalidated by the fact that the sum to raise which the land was sold included five cents for the United States Revenue stamp, to be put, and which was put, on the certificate issued to the purchaser at the sale. The court said that the item was improperly included, but that the error was cured by the provision of the Wisconsin statute of limitations affecting tax deeds, as construed by the courts of that State.

tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded."

§ 548. Local law and general law distinguished.

It is only on questions of local law involving the construction of a State constitution or statute, or which have become rules of property in the State, that the Federal courts follow as of course the decisions of the State courts. Such decisions are not "laws of the State" within the meaning of Section 721, Revised Statutes, which provides that, in the absence of Federal legislation, the laws of the several States shall be regarded as rules of decision in actions at law in the Federal courts in cases where they apply.[1] Rules of property may thus be established in a State in regard to real estate and domestic relations, which the Federal courts will follow, but upon questions of general jurisprudence or commercial law, the Federal courts exercise their own judgment. Thus the public purpose which will warrant the exercise of the State taxing power in the payment of municipal bonds is a question of general law.[2] This distinction was the basis of the judicial conflict in several States between the State and Federal courts, as to the validity of such municipal obligations. The court said, in the case cited, at p. 690: "The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us."

The Supreme Court can exercise this independent judg-

[1] Baltimore & Ohio R. R. Co. *v.* Baugh, 149 U. S. 368, Justice Field dissenting; Burgess *v.* Seligman, 107 U. S. 20; Warburton *v.* White, 176 U. S. 484. See also "The Common Law in the Federal Courts," by E. C. Eliot of St. Louis, 36 Am. Law Review, 498.

[2] Olcott *v.* Supervisors, 16 Wall. 678, Chief Justice Chase and Justices Davis and Miller dissenting.

ment on questions of general law, as distinguished from local law, only in the regular course of its jurisdiction. Thus, on writ of error to a State court, it can only decide a Federal question, and an erroneous decision of a State court upon a question of general law does not constitute a Federal question. The Supreme Court may dismiss a writ of error to review the decision of a State court in such a case, on the ground that no Federal question is involved, when, if the case had come before it in its regular appellate jurisdiction over the United States Circuit Court, it would have decided the question differently from the way the State court decided it.[1]

§ 549. Suits by stockholders in right of corporation.

The Income Tax decision was rendered in what is known as a stockholder's suit, one brought by a stockholder in right of the corporation to restrain the corporate management from threatened illegal use of the corporate assets. The right to maintain such a suit to restrain payment of an alleged illegal tax was sustained by the Supreme Court in *Dodge* v. *Woolsey*.[2] When this case was decided in 1859, there was no means by which the corporation could bring a suit in the United States Circuit Court against a citizen of the same State, in resisting a tax on the ground of a Federal right. Subsequently, by the Act of 1875, the law was amended so as to give the right, which still exists, to bring a suit in the United States Circuit Court, on the ground that the case involves a claim under the Constitution or laws of the United States, so that a stockholder's suit is no longer nec-

[1] See Central Land Co. *v.* Laidley, 159 U. S. 103, where Justice Gray in his opinion calls attention to an illustration of this distinction in two decisions relating to municipal bonds of Iowa. Gelpke *v.* Dubuque, 1 Wall. 175, and Railroad Co. *v.* McClure, 10 Wall. 511.

[2] 18 How. 331.

essary to secure original Federal jurisdiction for a domestic corporation in resisting taxation, on the ground of a Federal right.

This procedure however was resorted to in other cases not involving Federal questions, where it was desired to secure the jurisdiction of the United States Circuit Court on the ground of adverse citizenship, and the "non-resident stockholder" became a frequent litigant in the Federal courts. This resulted in the re-examination of the whole subject of stockholders' suits, in *Hawes* v. *Oakland*, decided in 1881, wherein an exhaustive opinion was rendered by Mr. Justice Miller,[1] and the conclusions of the opinion were formulated in Equity Rule 94, still in force.[2]

§ 550. Burden of proof in resisting taxation.

The burden of proof, which devolves upon the actor in all litigation, is emphasized in tax litigation, that is, in litigation involving the legality of taxation, in that the litigant must overcome the presumption that assumes the validity of the exercise of legislative power, and the further presumption when the acts of taxing officers are complained of, that such officers do not violate their sworn duty. This principle was forcibly illustrated in a case from New Orleans, where a State bank complained of an alleged

[1] 104 U. S. 450.

[2] Equity Rule 94 (adopted Oct. Term, 1881): "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by the operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

illegal assessment, on the ground that its capital was invested in legal tender notes, which were then exempt from taxation. The bank proved that it had some $760,000 invested in such notes, but its nominal capital was a million dollars, and it owed its depositors over $3,000,000. The Supreme Court[1] said that no proof was offered to show that the cash exclusively constituted the capital, and that the cash on hand was just as applicable to the depositors as to the capital. The burden of proof was therefore on the bank to show that it had been unlawfully taxed, and, in the absence of such proof, the decision of the assessor must stand.

§ 551. Federal taxes cannot be enjoined.

The United States statutes, already referred to,[2] prohibit the restraining of the assessment or collection of any tax in any court. This statute only applies to taxes levied by Congress, and neither a Federal nor a State court has authority to stay the collection of such a tax. If an injunction restraining the assessment and collection of a national tax is granted by a State court, it will on removal of the case to the United States Circuit Court be dissolved.[3]

The remedy, given by Act of Congress, of payment under protest and suit to recover, is exclusive, although the tax is alleged to have been illegally assessed.[4]

The appropriate remedy for recovery of taxes under the revenue acts of Congress is an action of assumpsit against the collector for money had and received. Where a party voluntarily pays money, he is without remedy, but when he pays it by compulsion, or under protest, he can sue to

[1] Canal and Banking Co. *v.* New Orleans, 99 U. S. 97.
[2] *Supra*, § 530.
[3] Kissinger *v.* Bean, 7 Biss. 60.
[4] Snyder *v.* Marlan, 109 U. S. 189.

recover. The United States Circuit Court has jurisdiction of such an action irrespective of citizenship.[1]

In the Income Tax Cases[2] the collector was not enjoined from collecting the tax, but the corporation defendant was enjoined from paying it.

The statute was held to have no application in a case of United States taxes, where the collector undertook to make a levy for a tax, which had been determined by the court not to be lawful, and an injunction was granted restraining the levy.[3]

§ 552. Remedy against tax officials individually.

In theory the officer who enforces an illegal tax, that is, a tax levied under an unconstitutional statute, has no official sanction for his acts. In the language of the Supreme Court:[4] "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." The same court has said that the ground of the jurisdiction in restraining the collection of taxes imposed in the name of the State, but contrary to the Constitution of the United States, and sought to be collected by seizure of property, is that the officers, though professing to act as officers of the State, are threatening a violation of the property or personal rights of the complainant, for which they are personally and individually liable as trespassers.[5]

The taxing power however may be unlawfully exercised under a valid statute. Thus assessors may err in not

[1] City of Philadelphia *v.* Collector, 5 Wall. 720. This was the procedure in the Insular Cases, *supra*, § 495.

[2] *Supra*, § 486.

[3] Frayser *v.* Russell, 3 Hughes 227.

[4] Norton *v.* Shelby County, 118 U. S., p. 442.

[5] In re Ayers, 123 U. S., p. 500.

allowing exemptions or deductions, or a tax may be excessive through discriminating valuation. In such cases the taxpayer is subjected to illegal taxation under a valid law, and the principle above stated has no application. Futhermore the principle of the individual responsibility of taxing officials is not of great practical importance, even in cases where it applies, as the remedy at law for damages against trespassing officials individually is rarely adequate to resist the unlawful exercise of the taxing power.

As tax assessors are empowered to exercise their discretion in the valuation of property, it is clear that they cannot be charged with personal responsibility for the erroneous exercise of such discretion. Thus it was held in New York[1] that assessors having jurisdiction of the person taxed and the subject-matter are not individually liable for an erroneous assessment made in good faith, even in refusing to allow deduction for debts in the case of bank shares, as required by the Act of Congress. On writ of error to the Supreme Court, this decision was held to involve, not any Federal question,[2] but one of general municipal law, to be governed by the common law or the statute law of the State. The fact that the error consisted of a misconstruction of an Act of Congress could make no difference, for an officer acting judicially is no more liable for a mistaken construction of an Act of Congress than he would be for mistaking the common law or a State statute. The immunity declared in this case is that which is always extended where public officers are vested with a discretion in the performance of their duties.

A tax collector is protected in the collection of tax bills fair upon their face, regularly issued from the tribunal having jurisdiction, and containing nothing by way of recital or omission to apprise him that they were issued

[1] Williams *v.* Weaver, 75 N. Y. 32.

[2] 100 U. S. 547.

without legal authority. He is protected in such action against all illegalities except his own.[1] This is the rule applied by the United States courts as to the United States collectors. The Supreme Court says that of such an officer the law exacts unhesitating obedience to its process.[2] This immunity is extended upon considerations of public policy and requires that the process shall be issued by an authority having jurisdiction of the subject-matter and that it be regular upon its face. It applies only to personal liability, and does not extend to the protection of any title acquired and conveyed by the collector in enforcing an illegal tax.

An officer who was charged with the specific duty of levying taxes to pay a judgment was held responsible in damages to the judgment plaintiff for failure to levy the tax as directed by a writ of *mandamus*. The court said, page 138:[3] "The rule is well settled, that where a law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender."[4]

§ 553. Importance of speedy remedy in taxation.

There is an obvious distinction between the remedies appropriate to the construction and administration of tax laws and those required in the determination of the validity

[1] Mechem on Public Officers, Sec. 690.

[2] Haffin *v.* Mason, 15 Wall. 671; Hardin *v.* Honeback, 137 U. S. 43.

[3] Amy *v.* Supervisors, 11 Wall. 136.

[4] In People *v.* Smith, 123 Cal. 70, the public assessor charged with the official duty of collecting poll taxes and personal property taxes was held, under the doctrine of the Amy case, to be responsible upon his official bond for failure to perform this ministerial duty.

of the taxation, that is, of the question whether the power of taxation has been lawfully exercised. In the former case it is right and proper that parties should be remitted to the remedy by legal action, especially when an adequate remedy is provided by payment under protest and suit to recover, as in the case of taxes levied by Congress and in some of the States, as provided by their statutes. While it is true that the government should not be embarrassed by the interruption of the collection of its revenue at stated periods, it is also true that, when the validity of a tax is involved, the public, as well as the private, taxpayer is interested in the speedy determination of the question. If the tax is invalid, the government should know it as soon as possible, so that it may provide other means of revenue; and the taxpayers should also know it, so they can avoid uncertainty and may promptly discharge what is lawfully due.

This consideration of public policy was forcibly illustrated in the Income Tax Cases, where the public interest demanding a speedy determination of the validity of the tax really forced a practical evasion of the provision of the Federal statute as to the form of procedure. The truth is that, in our busy industrial life, the extension of preventive remedies is demanded of a progressive jurisprudence, and in no department of the law is this so clearly to the interest both of the public and the private litigant, as in questions involving the validity of taxation. This is especially true, because the increasing expenditures of government are forcing the trial of new and experimental forms of taxation, and it frequently happens of recent years that test cases are made up and regular forms of procedure waived for the purpose of securing speedy judicial determination.

It is remarked by Mr. High, in his work on injunctions,[1]

[1] 1 High on Injunctions, § 484.

that in no branch of the law of injunctions has there been manifested greater apparent want of harmony in the decisions of the courts than in the exercise of the restraint on the power of taxation, and that it is difficult, if not impossible, to harmonize completely and perfectly the principles, which seem to have the weight of authority in their support, with all the decided cases. In the courts of the United States, as already shown, the alleged unconstitutionality of a tax is not sufficient ground for injunction, but there must be some circumstances bringing the case within the recognized scope of equity jurisdiction, such as a threatened cloud upon the title of real estate or a multiplicity of suits.[1]

Much has been said in judicial opinions of the public policy which forbids judicial interference with taxation, and the influence upon our jurisprudence of the ancient historic jealousy of courts of chancery is illustrated in the opinions of eminent judges. Thus in some States where license taxes are enforced by criminal prosecutions for doing business without license, this mode of enforcement is held to bar injunctive relief, on the ground that such relief would be enjoining criminal prosecutions; and in such cases parties are compelled to submit to a criminal conviction in order to test the validity of the tax, there being as a rule no right of appeal except from a conviction.[2]

[1] Dows *v.* Chicago, 11 Wallace 109; Union Pacific Railway Co. *v.* Cheyenne, 113 U. S. 516.

[2] For illustrative cases where the injunctive remedy was denied and the determination of the validity of a tax affecting extensive business interests only secured through criminal prosecution, see State ex rel. *v.* Wood, 155 Mo. 425; State *v.* Bixman, 162 Mo. 1. In the case first cited an injunction restraining the enforcement of the tax was arrested by a writ of prohibition, on the ground that the Circuit Court had no jurisdiction, because the bill did not state facts sufficient to bring the case within the class in which injunctions may be granted; while in the other case the tax itself was declared valid by a vote of only four judges against three.

But in a threatened trespass which may destroy property, what matters it that the trespasser may be also guilty of a crime? The injunction restrains, not the crime, but the irreparable injury to property. So, in the case of annoyances to business by threatened criminal prosecution enforcing illegal taxation, the jurisdiction of equity would be properly invoked, not to restrain the prosecutions as such, but to prevent the irreparable injury to business and property from the attempted enforcement of illegal exactions.

The fact that the State authorizes the payment of taxes under protest with suit to recover back, under the same system as authorized by Congress in regard to Federal taxes, has been held of itself to constitute an adequate remedy at law. *E converso*, should not the absence of such a statutory remedy be of itself a basis for preventive relief?

Judge Taft, in holding that, where a State gives a remedy by injunction against the assessment and collection of taxes on the ground of illegality, such statutory remedy may be afforded by the Federal court sitting in equity,[1] said "No one can doubt that the remedy by enjoining an illegal tax raises in the most summary and satisfactory way the question of the illegality of the tax, and relieves the taxpayer of the burden of paying the tax or waiting the slow process of a civil suit by the State to recover it from him."

It was said by Chief Justice Marshall in Osborn *v.* Bank, that the single act of levying the tax in the first instance is the cause of an action at law, but this affords a remedy only for the single act, and is not equal to the remedy in chancery which prevents a repetition and protects the privilege.

The Supreme Court of Massachusetts said: [2] "The power

[1] See § 530.

[2] Freeland *v.* Hastings, 10 Allen, 570, 575.

to raise and assess taxes, although essential and necessary to the maintenance and support of civil government, is to be exercised with care, and to be kept strictly within the limits imposed by law. It is the clear right of every citizen to insist that no unlawful or unauthorized exaction shall be made upon him under the guise of taxation. If any such illegal encroachment is attempted, he can always invoke the aid of the judicial tribunals for his protection, and prevent his money or other property from being taken and appropriated for a purpose or in a manner not authorized by the Constitution and laws. The legislature of this commonwealth have provided a speedy and effectual remedy against the danger of illegal assessment by towns and cities, and the unauthorized expenditure by them of money raised by taxation. Under the provisions of Gen. Stats. c. 18, Sec. 79, immediate resort can be had by a suit or petition to this court, sitting in equity, to hear and decide concerning the validity of a proposed tax or the right to pay money from the treasury of a town, and any violation or abuse of the legal right and power of raising taxes and assessing them on the inhabitants, as well as of expending money belonging to a city or town, can be effectually restrained and prevented by injunction."

The principle thus declared should be applied to every form of taxation, whether State or municipal. The public as well as private interests will be best subserved by the speediest possible determination, through the preventive jurisdiction of a court of equity, or by special statutory procedure, properly regulated to protect the public interests, in every case where is involved the validity of an exaction from persons, property or business under the taxing power.

APPENDIX.

CONSTITUTION OF THE UNITED STATES OF AMERICA.

Preamble. — We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION FOR THE UNITED STATES OF AMERICA.

ARTICLE I.

OF THE LEGISLATIVE POWER.

SECTION 1. **Legislative power, where vested.** — All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SEC. 2. **House of Represesentatives, how and by whom chosen.** — The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

Qualification of representative. — No person shall be a representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Apportionment of representatives and direct taxes — Census. — [Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.]* The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New

* Clause in brackets is amended by Fourteenth Amendment, sec. 2, *infra*.

York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Vacancies in House of Representatives. — When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

Speaker and officers of House — Impeachment. — The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SEC. 3. **Senators — Election and term of.** — The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Division into classes — Vacancies — Qualifications. — Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State from which he shall be chosen.

Vice-President. — The Vice-President of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided.

President pro tem. and other officers of Senate. — The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

Impeachment, power to try. — Presiding officer on trial. — The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment on impeachment. — Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the

United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SEC. 4. **Election of senators and representatives — Sessions of Congress.** — The times, places and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day.

SEC. 5. **Qualification of members — Judge of, quorum.** — Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

Rules of proceedings — Contempts, expulsions. — Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Journals — Yeas and nays. — Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Adjournments. — Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 6. **Compensation of members — Privileges.** — The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

Ineligibility to office. — No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SEC. 7. **Revenue bills — Where to originate.** — All bills for raising

revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Bills, approval of President — Veto, proceedings thereon. — Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Orders, resolutions and votes — President's approval, veto. — Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States, and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SEC. 8. **Powers of Congress.** — The Congress shall have power:

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to execute like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SEC. 9. **Migration and importation of persons.** — The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

Writ of habeas corpus. — The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.

Bills of attainder and ex post facto laws. — No bill of attainder or *ex post facto* law shall be passed.

Capitation and direct taxes. — No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

Taxation on exports — Commercial regulations. — No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one

State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.

Appropriations of public money — Accounts. — No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

Titles of nobility — Presents, etc., to officers. — No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince or foreign State.

SEC. 10. No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

OF THE EXECUTIVE.

SECTION 1. **President and Vice-President — Term of office, election of.** — The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same time, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list, the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.]*

Time of choosing electors.— The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

President's qualifications. — No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Vacancy in office of President. — In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Oath of. — Before he enter on the execution of his office, he shall take the following oath or affirmation: —

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States."

* Clause in brackets amended by Twelfth Amendment, *infra*.

SEC. 2. **Powers and duties of President.** — The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

Vacancies in office. — The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

SEC. 3. **Powers and duties of President continued.** — He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SEC. 4. **Conviction of treason, etc.** — The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

OF THE JUDICIARY.

SECTION 1. **Judicial power — Judges — Compensation — Tenure of office.** — The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SEC. 2. **Judicial power — Extends to what — Supreme Court, jurisdiction of.** — The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SEC. 3. **Treason against the United States.** — Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV.

MISCELLANEOUS PROVISIONS.

SECTION 1. — **Records and judicial proceedings of sister States.** — Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SEC. 2. **Privileges and immunities of citizens of the several States.** — The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Fugitives from justice. — A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

Fugitives from service or labor. — No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SEC. 3. **Admission of new States.** — New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

Government of United States — Territory and property. — The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

SEC. 4. **Guaranty to each State of a republican form of government.** — The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

Amendments to Constitution. — The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Congress: *Provided*, That no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

Debts prior to adoption of Constitution. — All debts contracted and engagements entered into before the adoption of this Constitution

shall be as valid against the United States under this Constitution as under the confederation.

Supreme law of the land. — This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Oath to support Constitution of United States — No religious test for United States office. — The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

Ratification of Constitution. — The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America, the twelfth. In witness whereof, we have hereunto subscribed our names.

GEORGE WASHINGTON, *President.*

ATTEST: WILLIAM JACKSON, *Secretary.*

AMENDMENTS TO THE CONSTITUTION.

PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

ARTICLE I.

Religious liberty — Freedom of speech — Right of petition. — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

Right to bear arms. — A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

Quartering of soldiers. — No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner prescribed by law.

ARTICLE IV.

Unreasonable searches, seizures, etc., prohibited. — The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

Rights of persons accused of crime — Right of property, etc. — No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

ARTICLE VI.

Criminal prosecutions — Speedy trial, etc. — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII.

Trial by jury in civil actions. — In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

ARTICLE VIII.

Excessive fines, etc., prohibited. — Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ARTICLE IX.

Rights retained by the people. — The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

Powers reserved to the State or people. — The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

Judicial power — Limitation on. — The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

(Proposed March 5, 1794, declared ratified January 8, 1798.)

ARTICLE XII.

Election of President and Vice-President. — The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate; the president of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest number not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of

all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

(Proposed December 12, 1803, declared ratified September 25, 1804.)

ARTICLE XIII.

SECTION 1. **Slavery prohibited.** — Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

SEC. 2. **Enforcement of prohibition.** — Congress shall have power to enforce this article by appropriate legislation.

(Proposed February 1, 1865, declared ratified December 18, 1865.)

ARTICLE XIV.

SECTION 1. **Citizenship — Rights of citizens — Due process of law and equal protection of the laws.** — All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. **Apportionment of representatives.** — Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male

inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. **Disqualification to hold office.** — No person shall be a senator or representative in Congress, or elector of President or Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. **Public debt.** — The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Proposed June 16, 1866; declared ratified July 28, 1868.)

ARTICLE XV.

SECTION 1. **Elective franchise.** — The rights of citizens of the United States to vote shall not be denied or abridged by the United States, or any State, on account of race or color, or previous condition of servitude.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

(Proposed February 27, 1869; declared ratified March 30, 1870.)

STATE CONSTITUTIONS ON TAXATION

The varying restrictions imposed by State constitutions upon the legislative power of taxation are shown in the following abstract. All of the State constitutions contain provisions guaranteeing due process of law in the protection of property. In some of the older States, as in some of the New England States and New York, there is no limitation upon the legislative power of taxation except in this general guaranty in the Bill of Rights for due process of law.

Many of the State constitutions contain the requirement of equality and uniformity in taxation, this being limited in some cases to the same class of subjects within the territorial limits of the authority levying the tax. It will be observed also that there is a material difference in the constitutions in the restrictions upon the legislative power of exempting from taxation. In some States legislative exemptions are prohibited and all property made subject to taxation except as specifically exempted in the constitution, while in others the legislature is authorized to make certain specific exemptions.

It will be observed that some of the constitutions are not framed upon the theory that the State legislative power is supreme in taxation except as limited by the State constitution, as they contain specific grants of power to levy certain forms of taxes, as poll taxes, license and inheritance taxes; and in some cases, as in Illinois and Minnesota, the power to make special assessments for local improvements is specifically given. These latter provisions however seem to have been made in view of prior decisions holding that such methods of taxation were inconsistent with the

constitutional requirement of equality and uniformity in taxation.

The more recent constitutions, as in Virginia, are notable for a more detailed and specific regulation of the exercise of the taxing power. On the other hand, there is a strong agitation favoring local option in taxation, that is, separating the sources of State and municipal revenue, and allowing municipalities to determine for themselves the subjects of taxation. This would involve the repeal of provisions in State constitutions which restrict the power of the legislature to regulate assessments and taxation, and require taxation of all property in a uniform manner by a uniform rule throughout the State.[1] Many of the constitutions contain express limitations upon the rates of State and municipal taxation, which have not been included in this abstract, the purpose being to include only the provisions which are illustrative of the policy of the State in restricting the taxing power.

ALABAMA.

(Constitution went into effect November 28, 1901.)

Sec. 91. The legislature shall not tax the property, real or personal, of the State, counties or other municipal corporations, or cemeteries; nor lots in incorporated cities or towns, or within one mile of any city

[1] The League of American Municipalities at its fourth annual convention held at Charleston, S. C., December 12-15, 1900, unanimously adopted the following resolutions: —

"*Resolved*, That all provisions in State constitutions should be abolished which restrict the power of the legislatures to regulate assessment and taxation.

"*Resolved*, That so much State revenue, as may be required in excess of that derived from specific taxes should be apportioned to and paid by the counties or towns in proportion to county or town revenue.

"*Resolved*, That every county or town and every city be granted the right to regulate the assesment and taxation of property at its discretion, provided any increase or reduction of assessment must be uniform throughout such county, town or city, and not made on the ground of ownership."

or town to the extent of one acre, nor lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, when same are used exclusively for religious worship, for schools, or for purposes purely charitable.

SEC. 92. The legislature shall by law prescribe such rules and regulations as may be necessary to ascertain the value of real and personal property exempted from sale under legal process by this constitution, and to secure the same to the claimant thereof as selected.

Article VIII, Sec. 178. (The payment of a poll tax is made a condition precedent of the right to vote. This poll tax, by Section 194, is to be $1.50 upon each male inhabitant over the age of twenty-one and under the age of forty-five years, who was not, when the constitution was adopted, exempt by law, but the legislature is authorized to increase the maximum age to not more than sixty years. No legal process is allowed for the collection of the poll tax, and any payment of the poll tax by another or the advancement of money for that purpose is made to constitute bribery. Under Section 259, the proceeds of all the poll taxes are applied to the support of the public schools.)

ART. XI, SEC. 211. All taxes levied on property in this State shall be assessed in exact proportion to the value of such property, but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hired during the current year of such rental or hire, if such real or personal property be assessed at its full value.

SEC. 212. The power to levy taxes shall not be delegated to individuals or private corporations or associations. (Under Sections 214, 215 and 216 the rates of tax in the State, counties and cities are specifically limited.)

SEC. 217. The property of private corporations, associations and individuals of this State shall forever be taxed at the same rate; provided, this section shall not apply to institutions devoted exclusively to religious, educational or charitable purposes.

SEC. 218. The legislature shall not have the power to require counties or other municipal corporations to pay any charges which are now payable out of the State treasury.

Section 219. (Authorizes the legislature to levy a collateral inheritance tax of not more than two and one-half per cent on all estates, real and personal, in the State, transferred by will or the intestate laws of the State.)

Art. XIV, Sec. 269. (A special county tax, specifically limited in rate, is authorized for the support of public schools.)

ARKANSAS.

ART. XVI, SEC. 5. All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the general assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper. Provided, further, that the following property shall be exempt from taxation: Public property used exclusively for public purposes; churches as such; cemeteries used exclusively as such; school buildings and apparatus, libraries and grounds used exclusively for school purposes and buildings and grounds and material used exclusively for public charity.

SEC. 6. All laws exempting property from taxation other than as provided in this constitution shall be void.

SEC. 7. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State may be a party.

SEC. 8. The General Assembly shall not have power to levy State taxes for any one year to exceed in the aggregate one per cent of the assessed valuation.

SEC. 11. No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; and no moneys arising from a tax levied for one purpose shall be used for any other purpose.

SEC. 13. Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.

CALIFORNIA.

Constitution, adopted 1879. SECTION 1. All property in the State not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. The legislature may provide, except in case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona fide* residents of this State. (Amendment ratified November 6, 1895.)

ART. XIII, SEC. 1. The following property is exempted from taxation: Growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State.

SEC. 2. Land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality, and similarly situated, shall be assessed at the same value.

SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to rail road and other *quasi* public corporations, in case of debt so secured, the value of the property affected by such mortgage, deed of trust, contract or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof in the county, city or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof: Provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.*

SEC. 5. Every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void.

SEC. 6. The power of taxation shall never be surrendered or suspended by any grant or contract to which the State shall be a party.

SEC. 7. The legislature shall have the power to provide by law for the payment of all taxes on real property by installments.

SEC. 8. The legislature shall by law require each taxpayer in this State to make and deliver to the county assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession or under his control, at twelve o'clock meridian on the first Monday of March.

SEC. 10. (Provides for the assessment of railroads, road-bed, tracks and rolling stock by the State Board "at the actual value," and appor-

* See *supra*, § 455.

tioned on the mileage basis to counties, etc., on the line; all other property to be assessed where located.)

SEC. 11. Income taxes may be assessed to and collected from persons, corporations, joint-stock associations or companies resident or doing business in this State, or any one or more of them, in such cases and amounts, and in such manner, as shall be prescribed by law.

SEC. 12. The legislature shall provide for the levy and collection of an annual poll tax.

COLORADO.

ART. X. SEC. 3. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Mines and mining claims bearing gold, silver, and other precious metals (except the net proceeds and surface improvements thereof) shall be exempt from taxation for the period of ten years from the date of the adoption of this constitution, and thereafter may be taxed as provided by law. Ditches, canals, and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed, so long as they shall be owned and used exclusively for such purpose.

SEC. 4. The property, real or personal of the State, counties, cities, towns and other municipal corporations, and public libraries, shall be exempt from taxation.

SEC. 5. Lots, with buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools, or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law.

SEC. 6. All laws exempting from taxation property other than hereinbefore mentioned, shall be void.

SEC. 9. (Is of the same import as the constitution of Arkansas, Art. XVI, Sec. 7.)*

* The following constitutional amendment, permitting local option in taxation and authorizing the imposition of a special tax on land values, was submitted and voted on at the general election, November, 1902, but is at this date, Nov. 6, 1902, reported defeated: —

SEC. 9. Once in four years, but not oftener, the voters of any county in the State may, at any general election, exempt or refuse to exempt from all taxation for county, city, town, school, road and other local purposes, any or all personal

CONNECTICUT.

(The constitution contains no restraint upon the taxing power of the State legislature, other than the general guaranty of "due course of law.")

DELAWARE.

ART. VIII, SEC. 1. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the general assembly may by general laws exempt from taxation such property as in the opinion of the general assembly will best promote the general welfare.

SEC. 5. (Provides for a capitation tax.)

SEC. 7. In all assessments of the value of real estate for taxation, the value of the land and the value of the buildings and improvements thereon shall be included. And in all assessments of the rental value of real estate for taxation, the rental value of the land and the rental value of the buildings and the improvements thereon shall be included. The foregoing provisions of this section shall apply to all assessments of the value of real estate or of the rental value thereof for taxation for State, county, hundred, school, municipal or other public purposes.

FLORIDA.

ART. IX, SEC. 1. The legislature shall provide for a uniform and equal rate of taxation and shall provide such regulations as will secure a just valuation of all property both real and personal, excepting such property as may be exempted by law for municipal, educational, library, scientific, religious or charitable purposes.

SEC. 5. The legislature may provide for levying a special capitation

property and improvements on land; but neither the whole nor any part of the full cash value of any rights of way, franchises in public ways, or land, exclusive of the improvements thereon, shall be exempted: Provided, however, that such question be submitted to the voters by virtue of a petition therefor, signed and sworn to by not less than one hundred resident taxpayers of such county, and filed with the county clerk and recorder, not less than thirty nor more than ninety days before the day of election.

SEC. 11. The rate of taxation on property, for State purposes, shall never exceed four mills on each dollar of valuation; but the provisions of this section shall not apply to rights of way, franchises in public ways or land — the full cash value of which may be taxed at such additional rate, not exceeding two mills on each dollar of assessed valuation, as shall be provided by law, after exempting all personal property and improvements thereon from such additional rate of taxation.

tax, and a tax on licenses. But the capitation tax shall not exceed one dollar a year, and shall be applied exclusively to common school purposes.

SEC. 8. No person or corporation shall be relieved by any court from the payment of any tax that may be illegal, or illegally or irregularly assessed, until he or it shall have paid such portion of his or its taxes as may be legal, and legally and regularly assessed.

SEC. 9. There shall be exempt from taxation property to the value of two hundred dollars to every widow that has a family dependent on her for support, and to every person that has lost a limb or been disabled in war or by misfortune.

GEORGIA.

ART. VII, SEC. 1. (Contains a specific designation of the purposes for which taxes may be levied: for the support of the government, public institutions, educational purposes, the public debt, the suppression of insurrection and invasion and defending the State in time of war, and also for the assistance of disabled Confederate soldiers and for their widows and orphans.)

SEC. 2, § 1. (Provides that all taxation shall be uniform on the same class of subjects and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. The general assembly may, however, impose a tax upon such domestic animals as, from their nature and habits, are destructive of other property.)

SEC. 2, § 2. The general assembly may, by law, exempt from taxation all public property, places of religious worship, all purely public charity institutions, all buildings erected for and used as a college, incorporated academy, or public library, * * * all books and philosophical apparatus; * * * Provided, the property so exempted be not used for purposes of private or corporate profit.

SEC. 2, § 3. No poll tax shall be levied except for educational purposes.

SEC. 2, § 4. All laws exempting property from taxation other than the property herein enumerated, shall be void.

SEC. 2, § 5. The power to tax corporations and corporate property shall not be surrendered or suspended by a contract or grant to which the State shall be a party.

IDAHO.

ART. VII, SEC. 2. The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or cor-

poration shall pay a tax in proportion to the value of his, her or its property, except as in this article otherwise provided. (License taxes and poll taxes are specifically authorized.) The legislature may exempt from taxation a limited amount of improvements upon lands.

SEC. 5. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all the property, real and personal; Provided, that the legislature may allow such exemption from the tax from time to time as shall seem necessary and just; Provided, further, that duplicate taxation of property for the same purpose for the same year is hereby prohibited.

(Under Act of March 3, 1895, the legislature has exempted not only school and church property, and $1,000 of the property belonging to widows and orphans where the total is $5,000 or less, but growing crops, capital stock of corporations where the corporate property is assessed, libraries, tools not exceeding $200, possessory rights to lands and mining claims, and all debts and credits secured by mortgage deed or other lien.)

SEC. 8. The power to tax corporations or corporate property, both real and personal, shall never be relinquished or suspended, and all corporations in this State, or doing business therein, shall be subject to taxation on real and personal property owned or used by them, and not by the constitution exempted from taxation, within the territorial limits of the authority levying the tax.

ILLINOIS.

ARTICLE IX, SEC. 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. (License taxes are specifically authorized.)

SEC. 3. The property of the State, counties, and other municipal corporations, property used exclusively for agricultural or horticultural societies, and for schools, religious, cemetery and charitable purposes may be exempted from taxation; but such exemption shall be only by general law.

SEC. 4. There shall be no sale of property for taxes or assessments but by some general officer of the county having authority to receive State and county taxes, upon the order or judgment of some court of record.

SEC. 6. The General Assembly shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or the property therein, from their or its proportion-

ate share of taxes to be levied for State purposes, nor shall commutation for such taxes be authorized in any form whatsoever.

SEC. 9. The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

(Prior to the adoption of this constitution in 1870, assessmen's on the frontage rule had been held unconstitutional, Chicago *v.* Larned, 34 Ill. 203, but under the present constitution such assessments are enforced.)

INDIANA.

ART. 10, SEC. 1. The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes as may be specifically exempted by law. (See State ex rel. *v.* Smith, 63 N. E. Rep. 25, 214, *supra.*)

IOWA.

ART. I, SEC. 6. The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

ART. III, SEC. 30. The general assembly shall not pass local or special laws for the assessment and collection of taxes for State, county or road purposes.

ART. VII, SEC. 7. Every law which imposes, continues or revises a tax shall distinctly state the tax and object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object.

ART. VIII, SEC. 2. The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals.

KANSAS.

ART. XI, SEC. 1. The legislature shall provide for a uniform and equal rate of assessment and taxation. Property used for State, county, municipal, literary, educational and charitable purposes, and personal property to the amount of at least $200.00 for each family, exempted from taxation.

SEC. 2. The legislature shall provide for taxing the notes, bills and other property of banks so that such property shall bear a burden equal to that imposed upon the property of individuals.

SEC. 4. No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such tax shall be applied.

KENTUCKY.

SEC. 170. (Among other property, the crops grown in the year of the assessment and in the hands of the producer, and household goods and other personal property of a person with a family, not exceeding $250.00 in value, are exempted from taxation. The General Assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location.)

SEC. 171. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the same; all taxes shall be levied and collected by general laws.

SEC. 172. All property not exempted from taxation by this constitution shall be assessed for taxation at its fair cash value.

SEC. 174. All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value unless exempted by this constitution; all corporate property shall pay the same rate of taxation paid by individual property; nothing in the constitution shall be so construed as to prevent the general assembly from providing for taxation, based on income, licenses or franchises.

SEC. 175. The power to tax property shall not be surrendered or suspended by any contract or grant to which the commonwealth shall be a party.

SEC. 180. (Gives special authority to levy a poll tax.)

SEC. 181. The general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes.

LOUISIANA.

CONSTITUTION of 1898. ART. 224. The taxing power may be exercised by the general assembly for State purposes, and by parishes and municipal corporations and public boards, under authority granted to them by the general assembly, for parish, municipal and local purposes, strictly public in their nature.

ART. 225. Taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax, and all property shall be taxed in proportion to its value, to be ascertained as directed by law; provided the assessment of all property shall never exceed the actual cash value thereof; and provided, further, that the taxpayers shall have the right of testing the correctness of their assessments before the courts of justice. In order to arrive at this equality and uniformity, the general assembly shall, at its first session after the adoption of this constitution, provide a system of equality and uniformity in assessments based upon the relative value of property in different portions of the State. The valuation put upon property for the purposes of State taxation shall be taken as the proper valuation for purposes of local taxation, in every subdivision in this State.

ART. 227. The taxing power may be used to provide pensions for indigent Confederate soldiers and sailors, and their widows, to establish markers or monuments upon the battlefields of the country, commemorative of the services of Louisiana soldiers on such fields, and to maintain a memorial hall in New Orleans, to collect memorials of the late Civil War.

ART. 228. The power to tax corporations and corporate property shall never be surrendered nor suspended by act of the general assembly.

ART. 230. Among other things, there shall be exempt from taxation for 10 years from January 1, 1900, the capital, machinery and other property employed in mining operations, and in the manufacture of textile fabrics, yarns, rope and certain other articles.

ART. 231. (Gives special authority to levy a poll tax.)

ART. 233. There shall be no forfeiture of property for non-payment of taxes, but there must be sale, with the privilege to the taxpayer of redeeming within one year. All deeds of sale made by the collectors shall be received as *prima facie* evidence of a valid sale.

ART. 234. The tax shall be designated by the year in which it is collectible, and the tax on movable property shall be collected in the year in which the assessment is made.

ART. 235. An inheritance tax may be levied by the legislature solely for support of the public schools on all inheritances greater than $10,000.

ART. 237. The legislature shall pass no law postponing the payment of taxes, except in case of overflow, general conflagration, general destruction of crops, or other public calamity.

ART. 242. Foreign corporations doing business in Louisiana may be licensed or taxed by a mode different from that provided for home companies, provided that this different mode shall be uniform, upon a graduated system, and shall be equal and uniform as to all corporations doing the same kind of business.

MAINE.

ART. IX, SEC. 7. A general valuation of property shall be taken at least once in 10 years.

SEC. 8. All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof.

SEC. 9. The legislature shall never, in any manner, suspend or surrender the power of taxation.

MARYLAND.

DECLARATION OF RIGHTS, ART. 15. The levying of taxes by the poll is grievous and oppressive and ought to be prohibited; paupers ought not to be assessed for the support of the government; but every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property; yet fines, duties or taxes may properly and justly be imposed or laid, with a political view for the good government and benefit of the community.

MASSACHUSETTS.

DECLARATION OF RIGHTS, ART. X. No part of the property of any individual can, with justice, be taken from him or applied to public uses, without his own consent or that of the representative body of the people.

PART 2, CH. 1, ART. IV. The general court has power to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying within the said commonwealth. (For a full statement of the Massachusetts system of taxation and the practical exemption of mortgages thereunder, see the report of the Tax Commission of 1897)

MICHIGAN. (Amended in 1900, see p. 265; also p. 789.)

ART. XIV, SEC. 11. The legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law.

SEC. 12. All assessments hereafter authorized shall be on property at its cash value.

SEC. 14. (Is the same as the Iowa constitution, Art VII, Sec. 7.)

MINNESOTA.

ART. IX. Finances of the State and Banks and Banking.

SEC. 1. All taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the State, provided that the legislature may by general law or specific act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, and in such manner as the legislature may prescribe. And provided further, that for the purpose of defraying the expenses of laying water pipes and supplying any city or municipality with water, the legislature may, by general or special law, authorize any such city or municipality, having a population of 5,000 or more, to levy an annual tax or assessment upon the lineal foot of all lands fronting on any water main or water pipe laid by such city or municipality within corporate limits of said city for supplying water to the citizens thereof without regard to the cash value of such property, and to empower such city to collect any such tax, assessments or fines, or penalties for failure to pay the same, or any fine or penalty for any violation of the rules of such city or municipality in regard to the use of water, or for any water rate due for the same.

SEC. 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money; but public burying grounds, public schoolhouses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall by general laws be exempt from taxation.

SEC. 4. (Same as Art. XI, Sec. 2, Kans. Const. *supra.*)

MISSISSIPPI.

SEC. 112. Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax *per capita* upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county.

SEC. 182. The power to tax corporations and their property shall never be suspended or abridged by any contract or grant to which the State or any political subdivision thereof may be a party, except that the legislature may grant exemptions from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period not exceeding five years.

MISSOURI.

ART. X, SEC. 2. The power to tax corporations and corporate property shall not be surrendered or suspended by act of the general assembly.

SEC. 3. Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.

SEC. 4. All property subject to taxation shall be taxed in proportion to its value.

SEC. 6. The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies; Provided, that such exemption shall be only by general law.

SEC. 7. All laws exempting property from taxation, other than the property above enumerated, shall be void.

SEC. 11. Taxes for county, city, town or school purposes may be levied on all subjects and objects of taxation, but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes.

(The frontage rule for street improvements is recognized in the charters of St. Louis and Kansas City, and also general incorporation acts for cities in the State, R. S., 1899, Secs. 5392, 5662. The area rule has been adopted for sewers, Sec. 5396. Under the amended city charter of St. Louis, Oct., 1901, street improvements are paid, one-fourth, according to the frontage rule, and three-fourths according to a district made up of one-half the adjoining blocks.)

MONTANA.

ART. XII, SEC. 1. The necessary revenue for the support and maintenance of the State shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for. The legislature may also impose a license tax, both upon persons and corporations doing business in the State.

SEC. 2. The property of the United States, the State, counties, cities, towns, school districts, municipal corporations, and public libraries shall be exempt from taxation; and such other property as may be used exclusively for agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity may be exempt from taxation.

SEC. 3. All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal, or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law.

SEC. 4 (Same as Sec. 181, Kentucky Const. 1891, *supra*.)

SEC. 5. (Same as Sec. 11, Missouri Const. 1875, *supra*.)

SEC. 7. (To the same effect as Sec. 228 Const. of La. 1898.)

SEC. 8. Private property shall not be taken or sold for the corporate debts of public corporations, but the legislative assembly may provide by law for the funding thereof, and shall provide by law for the payment thereof, by assessment and taxation of all private property not exempt from taxation within the limits of the territory over which such corporations respectively have authority.

SEC. 11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

SEC. 12. No appropriation of public moynes shall be made for a longer term than two years.

SEC. 16. (Provides for assessment of railroad tracks, rolling stock, etc., by the State Board, and mileage apportionment.)

SEC. 17. The word property as used in this article is hereby declared " to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the State and has been taxed.

NEBRASKA.

ART. IX, SEC. 1. The legislature shall levy a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, bankers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates.

SEC. 2. The property of the State, counties and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemptions shall be only by general laws. In the assessment of all real estate incumbered by public easement, any depreciation occasioned by such easement may be deducted in the valuation of such property. The legislature may provide that the increased value of lands, by reason of live fences, fruit and forest trees grown and cultivated thereon, shall not be taken into account in the assessment thereof.

SEC. 3. The right of redemption from all sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate for a period of not less than two years from such sales thereof; Provided, That occupants shall in all cases be served with personal notice before the time of redemption expires.

SEC. 4. The legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for State purposes, or

due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever.

SEC. 6. The legislature may vest the corporate authorities of cities, towns, or villages with power to make local improvements by special assessments, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

NEVADA.

ART. X, SEC. 1. The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed, and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes.

NEW HAMPSHIRE.

PART SECOND, ART. 6. While the public charges of government or any part thereof shall be assessed on polls and estates in the manner that has heretofore been practiced, in order that such assessments may be made with equality, there shall be a valuation of the estates within the State taken anew once in every five years, at least, and as much oftener as the general court shall order.

NEW JERSEY.

CONSTITUTION AS AMENDED IN 1875. ART. IV, SEC. 7, PAR. 12. Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value.

NEW YORK.

(The constitution of New York contains no limitation upon the legislative power of taxation, except in the requirement that every law imposing a tax shall state the purpose to which it is to be applied.)

NORTH CAROLINA.

DECLARATION OF RIGHTS, SEC. 17. No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.

ART. V, SEC. 1. The General Assembly shall levy a capitation tax on every male inhabitant in the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300.00 in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax shall never exceed two dollars on the head.

SEC. 2. (Provides for the application of the proceeds of the State and county capitation tax to education and the poor; only 25 per cent to go to the latter in any one year.)

SEC. 3. Laws shall be passed for taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and, also, all real and personal property, according to its true value in money. The general assembly shall also tax trades, professions, franchises, and incomes, provided that no income shall be taxed when the property from which it is derived is taxed.

SEC. 5. (Public property is exempted, and the general assembly is empowered to exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes; also wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers, libraries and scientific instruments, or any other personal property, to a value not exceeding $300.00.)

SEC. 6. (County taxes are not to exceed double the State taxes, except for special purposes and with the special approval of the general assembly.)

SEC. 7. Every act of the general assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

NORTH DAKOTA.

CONSTITUTION OF 1890, ART. XI, SEC. 175. (To the same effect as Iowa Const., Art. VII, Sec. 7.)

SEC. 176. Laws shall be passed taxing by uniform rule all property according to its true value in money. Property of the United States, the State, and county and municipal corporations is exempt from taxation. The legislative assembly shall by a general law exempt property used exclusively for school, religious, cemetery and charitable purposes, and personal property to any amount not exceeding in value $200 for each individual liable to taxation.

SEC. 177. All improvements on land shall be assessed in the manner prescribed by law, but plowing shall not be considered as an improvement or add to the value of land for the purpose of assessment.

SEC. 178. The power of taxation shall never be surrendered or suspended by any grant or contract to which the State or any county or other municipal corporation shall be a party.

SEC. 180. (Authorizes a poll tax.)

OHIO.

ART. XII, SEC. 1. The levying of taxes by the poll is grievous and oppressive; therefore, the general assembly shall never levy a poll tax for county or State purposes.

SEC. 2. Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and also all real and personal property according to its true value in money. Burial grounds, public schoolhouses, houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, * * * may, by general laws, be exempted from taxation; but all such laws shall be subjected to alterations and repeal; and the value of all property so exempted, shall, from time to time, be ascertained and published, as may be directed by law.

SEC. 3. (To the same effect as Kansas Constitution, Art. XI, Sec. 2.)

SEC. 5. No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.

OREGON.

ART. IX, SEC. 1. The legislative assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specifically exempted by law.

SEC. 3. (To the same effect as Iowa Const., Art. VII, Sec. 7.)

PENNSYLVANIA.

ART. IX, SEC. 1. All taxes shall be uniform within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit and institutions of purely public charity.

SEC. 2. All laws exempting property from taxation, other than the property above enumerated, shall be void.

SEC. 3. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party.

RHODE ISLAND.

ART. IV, SEC. 15. The general assembly shall, from time to time, provide for making new valuations of property, for the assessment of taxes, in such manner as they may deem best.

SOUTH CAROLINA.

ART. I, SEC. 36. All property subject to taxation shall be taxed in proportion to its value.

ART. IX, SEC. 1. The general assembly shall provide by law for a uniform and equal rate of assessment and taxation and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the proceeds of which alone shall be taxed, and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes.

SEC. 5. It shall be the duty of the general assembly to enact laws for the exemption from taxation of all public schools, colleges and institutions of learning, all charitable institutions in the nature of asylums for the infirm, deaf and dumb, blind, idiotic and indigent persons, all public libraries, churches and burying grounds; but property of associations and societies, although connected with charitable objects, shall not be exempt from State, county or municipal taxation: Provided, that this exemption shall not extend beyond the buildings and premises actually occupied by such schools, colleges, institutions of learning, asylums, libraries, churches and burial grounds, although connected with charitable objects.

SOUTH DAKOTA.

CONSTITUTION OF 1890, ART. IX, SEC. 2. All taxes to be raised in this State shall be uniform on all real and personal property according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. And the legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for assessing and levying of taxes on individual property.

SEC. 3. The power to tax corporations and corporate property shall

not be surrendered or suspended by any contract or grant to which the State shall be a party.

SEC. 4. The legislature shall provide for taxing all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also for taxing the notes and bills discounted or purchased, moneys loaned and all other property, effects, or dues of every description, of all banks and of all bankers, so that all property employed in banking shall always be subject to a tax equal to that imposed on the property of individuals.

SEC. 5. The property of the United States and of the State, county and municipal corporations, both real and personal, shall be exempt from taxation.

SEC. 6. The legislature shall, by general law, exempt from taxation, property used exclusively for horticultural societies, for school, religious, cemetery and charitable purposes, and personal property to any amount not exceeding in value two hundred dollars, for each individual liable to taxation.

SEC. 7. All laws exempting property from taxation other than that enumerated in sections 5 and 6 of this article, shall be void

SEC. 8. (To the same effect as Iowa Const., Art. VII, Sec. 7, *supra*.)

SEC. 10. The legislature may vest the corporate authority of cities, towns and villages with power to make local improvements by special taxation of contiguous property or otherwise. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such tax shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

TENNESSEE.

ART. II, SEC. 28. (In addition to other property, this section authorizes the legislature to exempt "one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee.") All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct.

The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the *ad valorem* tax on property.

The legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*. (This section also authorizes a poll tax.)

SEC. 30. No article manufactured of the produce of this State shall be taxed otherwise than by inspection fees.

TEXAS.

ART. VII, SEC. 1. Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax: Provided, that two hundred and fifty dollars' worth of household and kitchen furniture, belonging to each family in the State, shall be exempt from taxation, and, provided further, that the occupation tax levied by any county, city or town, for any year, on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period on such profession or business.

SEC. 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes (and the necessary furniture of all schools), and institutions of purely public charity; and all laws exempting property from taxation, other than the property above mentioned, shall be void.

SEC. 4. The power to tax corporations and corporate property shall not be surrendered or suspended by act of the legislature, by any contract or grant to which the State shall be a party.

SEC. 8. All property of railroad companies shall be assessed, and the taxes collected in the several counties in which said property is situated, including so much of the road-bed and fixtures as shall be in each county. The rolling stock may be assessed in gross in the county where the principal office of the company is located, and the county tax paid upon it shall be apportioned by the Comptroller in proportion to the distance such road may run through such county, among the several counties through which the road passes, as a part of their tax assets.

SEC. 10. The legislature shall have no power to release the inhabitants of, or property in, any county, city or town, from the payment of taxes levied for State or county purposes, unless in case of great public calamity in any such county, city or town, when such release may be made by a vote of two-thirds of each House of the legislature.

SEC. 17. The specifications of the objects and subjects of taxation shall not deprive the legislature of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this constitution.

SEC. 19. Farm products in the hands of the producer and family supplies for family and home use are exempt from all taxation until otherwise directed by a two-thirds vote of all the members elected to both Houses of the legislature. Rev. Stats. 1895, p. 142, Ch. 9, Sec. 544, 545.

UTAH.

ART. XIII, SEC. 2. All property in the State, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word property, as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of stocks of any company or corporation when the property of such company or corporation, represented by such stocks, has been taxed.

SEC. 3. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. Provided, that a deduction of debts from credits may be authorized. Provided, further, that the property of the United States, of the State, counties, cities, towns, school districts, municipal corporations and public libraries, lots with buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Ditches, canals and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose.

SEC. 4. (Same as Montana Const., Art XII, Sec. 17.)

SEC. 10. All corporations or persons in the State, or doing business

therein, shall be subject to taxation for State, county, school, municipal or other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax.

SEC. 12. Nothing in this constitution shall be construed to prevent the legislature from providing a stamp tax, or a tax based on income, occupation, licenses, franchises or mortgages.

VERMONT.

CHAPTER I, ART. 9. Every member of society has a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service, when necessary, or an equivalent thereto, but no part of any person's property can be justly taken from him, or applied to public uses without his consent, or that of the representative body of the freemen, * * *; and previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the legislature to be of more service to the commonwealth than the money would be if not collected.

VIRGINIA.

CONSTITUTION OF 1902. BILL OF RIGHTS, SEC. 11. No person shall be deprived of his property without due process of law.

ARTICLE II, SECTION 21. (The payment of State poll taxes at least six months prior to election during three years preceding the offer to vote is made a prerequisite of the right to vote after January 1, 1904.)

ARTICLE III, SEC. 50. Every law imposing, continuing or reviving a tax shall specifically state such tax and no law shall be construed as so stating such tax, which requires reference to any other law or to any other tax.

ARTICLE VIII, SEC. 128. In cities and towns the assessment of real estate and personal property for the purposes of municipal taxation shall be the same as the assessment thereof for the purposes of State taxation, whenever there shall be a State assessment for such property.

ARTICLE XII, SEC. 157. (Annual registration fees are required of every domestic corporation and foreign corporation doing business in the State, of not less than $5 nor more than $25, which shall be irrespective of any specific license or other tax imposed by law upon such company for the privilege of carrying on business in the State, or upon its franchise or property; provision to be made therefor by general laws.)

ARTICLE XIII, SEC. 168. All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of

the authority levying the tax, and shall be levied and collected under general laws.

SEC. 169. Except as hereinafter provided, all assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law. The general assembly may allow a lower rate of taxation to be imposed for a period of years by a city or town upon land added to its corporate limits, than is imposed on similar property within its limits at the time such land is added. Nothing in this constitution shall prevent the general assembly, after the first day of January, nineteen hundred and thirteen, from segregating for the purposes of taxation, the several kinds or classes of property, so as to specify and determine upon what subjects, State taxes, and upon what subjects, local taxes may be levied.

SEC. 170. The general assembly may levy a tax on incomes in excess of six hundred dollars per annum; may levy a license tax upon any business which cannot be reached by the *ad valorem* system; and may impose State franchise taxes, and in imposing a franchise tax, may, in its discretion, make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation. Whenever a franchise tax shall be imposed upon a corporation doing business in this State, or whenever all the capital, however invested, of a corporation chartered under the laws of this State, shall be taxed, the shares of stock issued by any such corporation, shall not be further taxed. No city or town shall impose any tax or assessment upon abutting land owners for street or other public local improvements, except for making and improving the walkways upon then existing streets, and improving and paving then existing alleys, and for either the construction, or for the use of sewers; and the same when imposed, shall not be in excess of the peculiar benefits resulting therefrom to such abutting land owners. Except in cities and towns, no such taxes or assessments, for local public improvements shall be imposed on abutting land owners.

SEC. 171. The general assembly shall provide for a reassessment of real estate, in the year nineteen hundred and five, and every fifth year thereafter, except that of railway and canal corporations, which, after January the first, nineteen hundred and thirteen, may be assessed as the general assembly may provide.

SEC. 172. The general assembly shall provide for the special and separate assessment of all coal and other mineral land; but until such special assessment is made, such land shall be assessed under existing laws.

Section 173. (Provides for the levy by the general assembly of a State capitation tax not exceeding $1.50 per annum on every male resident of the State of not less than 21 years of age, except those pensioned by the State for military services, $1 thereof for the schools and the residue to be applied for county or State purposes; but this capitation

tax is not to be collected from any exempt property. An additional capitation tax may be authorized by the general assembly for any county or city, not exceeding $1 per annum on every resident, to be applied in aid of public schools, or for county or State purposes.)

SEC. 174. After this constitution shall be in force, no statute of limitation shall run against any claim of the State for taxes upon any property; nor shall the failure to assess property for taxation defeat a subsequent assessment for and collection of taxes for any preceding year or years, unless such property shall have passed to a *bona fide* purchaser for value, without notice; in which latter case the property shall be assessed for taxation against such purchaser from the date of his purchase.

SEC. 176. (The roadbed, real estate, rolling stock and all personal property of railway corporations, the canal bed and other real estate of canal companies, is to be valued by the State Corporation Commission at such rates of taxation as may be imposed by them respectively, for State, county, city, town or district purposes, upon the real estate and personal property of natural persons. But no income tax is to be levied upon such corporations.)

Sections 177 and 178. (Provide for an annual State franchise tax upon railway and canal corporations, including those exempt from taxation as to their works, visible property or profits, equal to one per cent upon gross receipts for the privilege of exercising franchises in the State, these gross receipts in the case of interstate lines being computed upon the mileage basis, a reasonable deduction being made "because of any excess of value of terminal facilities or other similar advantages in other States over similar facilities or advantages in this State." This franchise tax with the property taxed in sections 176 being in lieu of all other taxes or licenses upon the corporate franchises or shares of stock in property, but does not exempt from the annual corporation fee under section 157, nor from assessments for street and other public local improvements, nor does it effect contracts made with municipalities for compensation for the use of streets or alleys.)

(Under sections 179 and 180 provision is made for annual reports of property subject to taxation and for the collection of taxes and a special procedure is authorized for the judicial determination of complaints of tax assessments.)

SEC. 182. Until otherwise prescribed by law, the shares of stock issued by trust or security companies chartered by this State, and by incorporated banks, shall be taxed in the same manner in which the shares of stock issued by incorporated banks were taxed, by the law in force January the first, nineteen hundred and two; but from the total assessed value the shares of stock of any such company or bank, there shall be deducted the assessed value of its real estate

otherwise taxed in this State, and the value of each share of stock shall be its proportion of the remainder.

SEC. 183. (This section contains a list of property which, and which only, shall be exempt from taxation, State and local, but it is provided that the general assembly may hereafter tax any of the property exempted except property directly or indirectly owned by the State or its subdivisions and obligations issued by the State since February 14, 1882, or hereafter exempted by law. The exempt property, subject however to be taxed by the general assembly, includes buildings and furniture and furnishings used for religious worship or for the residence of the minister; private and public burying grounds; property held for educational or charitable purposes, when not owned by corporations having shares of stock, and permanent endowment funds of such educational or charitable institutions. "But the exemption mentioned in this sub-section shall not apply to any industrial school, individual or corporate, not the property of the State, which does work for compensation, or manufactures and sells articles, in the community in which such school is located; provided, that nothing herein contained shall restrict any such school from doing work for or selling its own products or any other article to any of its students or employees." It is also provided that no inheritance tax shall be charged directly or indirectly against any legacy, when devised to any institution whose property is exempt from taxation. Where buildings or lots are leased and made the source of revenue, they shall be subject to local taxation. "Obligations issued by counties, cities, or towns may be exempted by the authorities of such localities from local taxation.")

SEC. 188. No other or greater amount of tax or revenue shall, at any time, be levied than may be required for the necessary expenses of the government, or to pay the indebtedness of the State.

Section 189. (Limits the rate of taxation on all lands and improvements and on all tangible personal property not exempt from taxation by the provisions of this article. A special tax for pensions is also authorized for a limited time.)

WASHINGTON.

ART. VII, SEC. 2. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: Provided, that a deduction of debts from credits may be authorized; Provided, further, that the property of the United States, and of the State, counties, school districts and other municipal corporations, and such other prop-

erty as the legislature may by general laws provide, shall be exempt from taxation.

SEC. 4. (The same as La. Const. 1898, Art. 228.)

SEC. 5. (The same as Iowa Const. 1857, Art. VII, Sec. 7.)

SEC. 9. The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

WEST VIRGINIA.

ART. X, SEC. 1. Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious or charitable purposes; all cemeteries and public property may, by law, be exempted from taxation. The legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations.

SEC. 2. (Provides that a capitation tax shall be levied for the public schools.)

SEC. 9. The legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority levying the same.

WISCONSIN.

ART. VIII, SEC. 1. The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe.

WYOMING.

ART. I, SEC. 28. All taxation shall be equal and uniform.

ART. XV, SEC. 3. All mines and mining claims from which gold, silver, and other precious metals, soda, saline, coal, mineral oil or other valuable deposit, is or may be produced, shall be taxed in addition to the surface improvements, and in lieu of taxes on the lands, on the gross product thereof, as may be prescribed by law; provided, that the product of all mines shall be taxed in proportion to the value thereof.

SEC. 5. (Requires the imposition of a poll tax for school purposes.)

SEC. 11. All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal.

SEC. 12. The property of the United States, the State, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for religious worship, church parsonages, public cemeteries, shall be exempt from taxation, and such other property as the legislature may by general law provide.

SEC. 13. (Same as Iowa Const. 1857, Art. VII, Sec. 7.)

SEC. 14. The power of taxation shall never be surrendered or suspended by any grant or contract to which the State or any county or other municipal corporation shall be a party.

ADDENDA.

Discriminations between residents and non-residents:

In Sprague *v.* Fletcher, 69 Vt. 69, 37 L. R. A. 840, a State tax allowing to residents the deduction of debts without allowing such deduction to non-residents was held a denial of the equal privileges and immunities of citizens guaranteed by the United States Constitution, Article IV, Section 2. See § 458, *supra*.

MICHIGAN. Constitutional amendments of 1900 (*supra*, pages 265, 772), Public Acts of Michigan, 1901, p. 404.

Art. XIV, Sec. 10. (Authorizes legislature to levy specific taxes upon corporations and to tax corporate property at its true cash value through assessments by a State Board of Assessors. Application of specific taxes is provided for).

Sec. 11. The legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law; *Provided*, That the legislature shall provide an uniform rule of taxation for such property as shall be assessed by a State Board of Assessors, and the rate of taxation on such property shall be the rate which the State Board of Assessors shall ascertain and determine is the average rate levied upon other property, upon which ad valorem taxes are assessed for State, county, township, school and municipal purposes.

Sec. 13. (Provides for equalization of assessments by State Board in 1901 and at five-year intervals, and at such other times as the Legislature may direct.)

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